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RICHARD BERRY, D.D.

ROBERT THOMSON

IN FOUR VOLUMES

VOL III

CONDOR

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THE
Ecclesiastical Law.

BY
RICHARD BURN, LL.D.

CHANCELLOR OF THE DIOCESE OF CARLISLE,
AND VICAR OF ORTON, IN THE COUNTY OF WESTMORELAND;
AUTHOR OF "THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE."

The Ninth Edition,
CORRECTED; WITH CONSIDERABLE ADDITIONS,
INCLUDING THE STATUTES AND CASES TO THE PRESENT TIME;

BY
ROBERT PHILLIMORE,

ADVOCATE IN DOCTORS' COMMONS, BARRISTER OF THE MIDDLE TEMPLE, OFFICIAL
TO THE ARCHDEACONRIES OF LONDON AND MIDDLESEX, AND
LATE STUDENT OF CHRIST CHURCH, OXFORD.

["Omnes legibus regantur etiam si ad divinam domum pertineant."—COD. l. i. tit. xiv. s. 10.

"Certain it is, that this kingdom hath been best governed, and peace and quiet preserved, when both parties, that is, when the justices of the temporal courts and the ecclesiastical judges, have kept themselves within their proper jurisdiction, without encroaching or usurping upon one another."—LORD COKE, 3 Inst. 321.]

IN FOUR VOLUMES.
VOL. III.

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1842.

Bequest of
the
Rev. John
Norton

THE

REICHARD RUTZ, LAND

THE

REICHARD RUTZ, LAND

LONDON :

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BELL YARD, TEMPLE BAR.

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ADDENDA ET CORRIGENDA

TO

VOL. III.

Oaths.

PAGE

- 35.—See further, the 3 & 4 Will. 4, c. 82, as to Separatists; and 1 & 2 Vict. c. 77, as to such persons as *have been* Quakers or Moravians.

Ordination.

- 44.—The curacy of the parish of St. T. having become vacant, the vicar, in whom the right of nomination was vested, nominated a *layman*, who presented himself to the Archbishop of D. for the purpose of being examined previous to ordination. The archbishop refused to examine him: Held, that the *refusal was discretionary*, and that the court would not grant a mandamus to the archbishop requiring him to proceed to examination. (*Rex v. Archbishop of Dublin*, 1 Alcock & Napier, 244, Irish Reports.)
- 70, n. (g).—See also titles *Church in Scotland*, *Church in the Colonies*, and *Church of England in Foreign Dominions*, for the orders of Scotch, Colonial, and American bishops, and their effect in England.

Parish.

- 73.—Although parish forms part of a union under 4 & 5 Will. 4, c. 76, the land is not divested out of the churchwardens and overseers. *Norton v. Webster*, 4 P. & D. 270.

Parish Clerk.

- 89, l. 6.—See also the cases of *Ex parte Cirketh*, 3 Dowl. P. C. 327; and also *Rex v. Neale*, 4 Nev. & M. 868; and *Bowles v. Neale*, 7 C. & P. 262. *Semble*, it is admitted by temporal courts that the ordinary may deprive parish clerk for a sufficient cause.

Physician.

- 115.—25 Geo. 2, c. 37, repealed by 9 Geo. 4, c. 31. And see s. 5 of latter act, which is repealed by 2 & 3 Will. 4, c. 75, s. 16, which directs that the bodies of murderers shall be hung in chains or burned within the precincts of the prison. Hanging in chains is repealed by 4 & 5 Will. 4, c. 26.

Practice.

185. *Pauper*.—*Churchwardens of Hornchurch v. Pigott*, 5 Jur. 1201.
218. *Appeal*.—*Semble*, where a party has duly appealed, the judge of the court below cannot limit the time of appeal. *Rookes v. Rookes*, 2 Curt. 345.
- 237—243—*Orders in Council*.—Prefix the following dates: 4th February, 1833; 5th February, 1833; 9th December, 1833; 9th December, 1833; 10th December, 1833.

PAGE

224. *Letters of Request*.—(*Vide infra, Articles.*) *Hawes v. Pellatt*, 2 Curt. 473.
227. *Evidence*.—*De bene esse*, *Weguelin v. Weguelin*, 2 Curt. 263; *Goodrich v. Jones*, *ibid.* 630 (interest);—*Mackenzie v. Yeo*, *ibid.* 509; *Allen v. Macpherson*, *ibid.* 513; *White v. Beard*, *ibid.* 487 (as to pleading county history.)
253. *Citation*.—Husband's domicile *prima facie* that of wife, *Whitcomb v. Whitcomb*, 2 Curt. 516.
284. *Articles*.—Under 3 & 4 Vict. c. 86, *Burder v. Langley*, 5 Jurist, 985; brawling, *Saunders v. Head*, 6 Jur. 86; one person, except in the case of churchwardens, should promote office of judge, *Cory v. Byron*, 2 Curt. 403.
- 306.—Rules of evidence in ecclesiastical courts not to be imported into courts of common law, *Wright v. Latham*, 5 Cl. & F. 670; as to evidence at common law of proceedings in ecclesiastical courts, *Leake v. Westmeath*, 2 Moody & Rob. 394.
333. *Costs*.—See also *Hawes v. Pellatt*, 2 Curt. 479; *Baker v. Thoroughgood*, *ibid.* 345; *Edmunds v. Unwin*, *ibid.* 641; *Chesterton v. Farlar*, *ibid.* 77; *Armstrong v. Huddleston*, 1 Moore P. C. R. 478. Security for, *Woods v. Woods*, 2 Curt. 516.

Privileges and Restraints of the Clergy.

- 360, n. (l).—See since the printing of this note, the cases of *Saunders v. Head*, 6 Jurist, 86, and *Burder v. Langley*, 5 Jurist, 985.
- 366.—5 Vict. c. 14, s. 1, as to spiritual persons in banking copartnerships.

Proctor.

- 380.—As to costs, *Edmunds v. Unwin*, 2 Curt. 641.

Residence-Houses of Archbishops and Bishops.

- 539.—See Appendix.

Schools.

- 546.—*Charity*, see Addenda to vol. 1, **Charitable Uses**.

Sexton.

- 603.—A Woman may also be overseer, *Rex v. Stubbs*, 2 Durn. & East, 406.

Sinecure.

- 652.—See a further provision on this subject, sect. 27 of 4 & 5 Vict. c. 39, passed since the printing of this volume.

Swearing.

- 671.—19 Geo. 2, c. 2, s. 13, repealed by 4 Geo. 4, c. 31, s. 1.

(2)

THE
ECCLESIASTICAL LAW.

Ne Admittas.

NE ADMITTAS (so called from those words in the writ, *prohibemus ne admittas*) is a writ directed to the bishop at the suit of one who is patron of any church, and he doubts that the bishop will collate a clerk of his own, or admit a clerk presented by another to the same benefice; then he that doubts it shall have this writ, to prohibit the bishop that he shall not collate or admit any to that church, pending the suit (*a*).

New Style—See Calendar.

Nocturn.

NOCTURN was a service so called, from the ancient Christians rising in the night to perform the same (*b*).

Nomination to a Benefice—See Benefice.

Non-conformists—See Dissenters.

Non-residence—See Residence.

Notable Goods—See Wills.

(*a*) Terms of the Law. See *ante*, vol. i. p. 31.

(*b*) Gibbs. 263.

Notary Public. (c)

Notary, who.

A NOTARY was anciently a scribe, that only took *notes* or minutes, and made short draughts of writings, and other instruments both public and private. But at this day we call him a notary public, who confirms and attests the truth of any deeds or writings in order to render the same authentic (*d*).

The law books give to a notary several names or appellations; as *actuarius*, *registrarius*, *scriniarius*, and such like. All which words are put to signify one and the same person. But in England, the word *registrarius* is confined to the officer of some court, who has the custody of the records and archives of such court, and is oftentimes distinguished from the *actuary* thereof. But a register ought always to be a notary public, for that seems to be a necessary qualification of his office.

How
appointed.

2. A notary public is appointed to this office by the Archbishop of Canterbury; who in the instrument of appointment decrees, that "full faith be given, as well in as out of judgment, to the instruments by him to be made." Which appointment is also to be registered and subscribed by the clerk of his majesty for faculties in Chancery (*e*).

[The chief officer of the Archbishop of Canterbury is the Master of Faculties, to whom applications are to be made for the admission or the removal, under any special circumstances, of notaries. In the Institutes the Court of Faculties is stated to be, "a court, although it holdeth no plea of controversie. It belongeth to the archbishop, and his officer is called *magister ad facultates* (*f*)."]

No Person
shall sue for
any Dispen-
sation or Li-
cence to the
Bishop of
Rome.

[Notaries are mentioned in the Statute of Provisors, 27 Edw. 3, stat. 1, c. 1 (A.D. 1353), and in the 16th of Rich. 2, c. 5, s. 2 (A.D. 1392-3), commonly called the Statute of Præmunire. The third section of 25 Hen. 8, c. 21, enacts as follows: "That neither your highness, your heirs nor successors, kings of this realm, nor any your subjects of this realm, nor of any other your dominions, shall from henceforth sue to the said bishop of Rome called the Pope, or to the see of Rome, or to any person or persons having or pretending any authority by the same, for licences, dispensations, compositions, faculties, grants, rescripts, delegacies, or any other instruments or writings, of what kind, name, nature, or quality soever they be of, for any cause or matter, for the which any licence, dispensation, composition, faculty, grant, rescript, delegacy, instrument, or other writing, heretofore hath been used and accustomed to be had and obtained at the see of Rome, or by authority thereof, or

(c) [See Brooke's Treatise on the Office and Practice of a Notary.]

(d) Ayl. Par. 382.

(e) 1 Ought. 486; Ayl. Par. 385.

(f) Inst. part. 4, p. 337.

of any prelates of this realm ; (2) nor for any manner of other licences, dispensations, compositions, faculties, grants, rescripts, delegacies, or any other instruments or writings that in causes of necessity may be lawfully granted without offending of the Holy Scriptures and laws of God ; (3) but that from henceforth every such licence, dispensation, composition, faculty, grant, rescript, delegacy, instrument and other writing afore named and mentioned, necessary for your highness, your heirs and successors, and you and their people and subjects, upon the due examinations of the causes and qualities of the persons procuring such dispensations, licences, compositions, faculties, grants, rescripts, delegacies, instruments or other writings, shall be granted, had or obtained, from time to time, within this your realm, and other dominions, and not elsewhere, (4) in manner and form following, and none otherwise ; that is to say, the Archbishop of Canterbury for the time being, and his successors, shall have power and authority, from time to time, by their discretions, to give, grant, and dispose, by an instrument under the seal of the said archbishop, unto your majesty, and to your heirs and successors, kings of this realm, as well all manner such licences, dispensations, compositions, faculties, grants, rescripts, delegacies, instruments, and all other writings, for causes not being contrary or repugnant to the Holy Scriptures and laws of God, as heretofore hath been used and accustomed to be had and obtained by your highness, or any your most noble progenitors, or any of your or their subjects, at the see of Rome, or any person or persons by authority of the same ; (5) and all other licences, dispensations, faculties, compositions, grants, rescripts, delegacies, instruments, and other writings, in, for and upon all such causes and matters as shall be convenient and necessary to be had, for the honour and surety of your highness, your heirs and successors, and the wealth and profit of this your realm ; (6) so that the said archbishop or any of his successors, in no manner wise shall grant any dispensation, licence, rescript, or any other writing afore rehearsed, for any cause or matter repugnant to the law of Almighty God."

The Archbishop of Canterbury may grant Dispensations to the King.

[The fourth section provides that the archbishop or his "sufficient and substantial deputy" may grant such faculties.

[It would seem from this section that an appeal lay from the master of the faculties to the lord chancellor.

[By the twentieth section of 6 Geo. 4, c. 87, it is enacted as follows : "That from and after the passing of this act it shall and may be lawful for any and every consul general or consul appointed by his majesty at any foreign port and place, whenever he shall be thereto required, and whenever he shall see necessary, to administer at such foreign port or place any oath, or take any affidavit or affirmation from any person or persons whomsoever, and also to do and perform at such foreign port

Oaths may be administered by Consuls.

or place all and every notarial acts or act which any notary public could or might be required, and is by law empowered to do within the united kingdom of Great Britain and Ireland; and every such oath, affidavit or affirmation, and every such notarial act, administered, sworn, affirmed, had or done by or before such consul general or consul, shall be as good, valid and effectual, and shall be of like force and effect, to all intents and purposes, as if any such oath, affidavit or affirmation, or notarial act respectively, had been administered, sworn, affirmed, had or done before any justice of the peace or notary public in any part of the united kingdom of Great Britain or Ireland, or before any other legal or competent authority of the like nature."

41 Geo. 3,
c. 79.

[The 41 Geo. 3, c. 79, intituled "An Act for the better Regulation of Public Notaries in England(g)," enacts as follows:

No Person in
England to
act unless
duly ad-
mitted.

"Whereas it is expedient, for the better prevention of illiterate and inexperienced persons being created to act as, or admitted to the faculty of public notaries, that the said faculty should be regulated in England; be it enacted, that, from and after the first day of August one thousand eight hundred and one, no person in England shall be created to act as a public notary, or use and exercise the office of a notary, or do any notarial act, unless such person shall have been duly sworn, admitted and inrolled, in manner hereinafter directed, in the court wherein notaries have been accustomed to be sworn, admitted and inrolled."

No Person
admitted a
Notary unless
he has served
as an Appren-
tice to a No-
tary or Scri-
vener for
seven years;
and if bound
after August
1, 1801, un-
less Affidavit
of the Exe-
cution of the
Contract, &c.
be made and
filed in the
proper Court.

[Sect. 2. "That from and after the said first day of August one thousand eight hundred and one, no person shall be sworn, admitted, and inrolled as a public notary, unless such person shall have been bound, by contract in writing or by indenture of apprenticeship, to serve as a clerk or apprentice, for and during the space of not less than seven years, to a public notary, or a person using the art and mystery of a scrivener (according to the privilege and custom of the city of London, such scrivener being also a public notary), duly sworn, admitted, and inrolled, and that such person, for and during the said term of seven years, shall have continued in such service; and also unless every such person who shall, from and after the said first day of August, be bound by contract in writing or indenture of apprenticeship, to serve as a clerk or apprentice to any public notary or scrivener being also a public notary, shall within three months next after the date of every such contract or indenture of apprenticeship cause an affidavit to be made, and duly sworn by one of the subscribing witnesses, of the actual execution of every such contract or indenture of apprenticeship by such public notary, or scrivener (being also a public notary), and the person so to be bound to serve as a clerk or apprentice as aforesaid; and in every such affidavit shall be specified the names of every such public notary or scrivener (being a public notary), and of every such person so bound, and their places of abode respectively, together with the day of the date of such contract or indenture of apprenticeship; and every such affidavit shall be sworn and filed within the time aforesaid, in the court where the public notary, to

(g) [Passed June 27, 1801.]

whom every such person respectively shall be bound as aforesaid, shall have been inrolled as a notary, with the proper officer or officers, or his or their respective deputy or deputies, who shall make or sign a memorandum of the day of filing every such affidavit on the back or at the bottom of such contract or indenture."

41 Geo. 3,
c. 79.

[Sect. 3. "That no person who shall, after the said first day of August become bound as aforesaid, shall be admitted or inrolled a public notary in the Court of Faculties for admitting and inrolling public notaries, before such affidavit shall be produced and openly read in such court, at the time of such person's admission and inrolment."

Such Affidavit produced on Admission.

[Sect. 4. "That the following persons shall be deemed and taken to be the proper officers for taking and filing such affidavits; (that is to say,) the master of the faculties of his grace the Lord Archbishop of Canterbury in London, his surrogate or commissioners."

Officers for taking and filing Affidavits.

[Sect. 5. "That the officer filing such affidavits as aforesaid shall keep a book, wherein shall be entered the substance of such affidavit, specifying the names and places of abode of every such public notary, and clerk or person bound as aforesaid, and of the person making such affidavit, with the date of the contract or indenture of apprenticeship in such affidavit to be mentioned, and the days of swearing and filing every such affidavit respectively; and such officer shall be at liberty to take, at the time of filing every such affidavit, the sum of five shillings and no more, as a recompense for his trouble in filing such affidavit; and which book shall and may be searched in office hours by any person or persons whomsoever, upon payment of one shilling for such search."

Officer filing Affidavits to enter the Substance in a Book.

Fee.

Book may be searched.

Fee.

[Sect. 6. "That, from and after the said first day of August, no public notary, or scrivener being also a public notary, shall take, have, or retain any clerk or apprentice who shall become bound as aforesaid, after such public notary, or scrivener being also a public notary, shall have discontinued or left off, or during such time as he shall not actually practise or carry on the business of a public notary."

No Public Notary to have any Apprentice, but while he shall actually practise.

[Sect. 7. "That every person who shall, from and after the said first day of August, become bound by contract in writing or indenture of apprenticeship to serve any public notary as hereby directed, shall, during the whole time and term of service to be specified in such contract or indenture of apprenticeship, or during the time and space of seven years thereof at least (if bound for a longer term than seven years), continue and be actually employed by such public notary, or scrivener being also a public notary, in the proper business, practice, or employment of a public notary."

Apprentice to be actually employed Seven Years in the Business.

[Sect. 8. "That if any such public notary, or scrivener being also a public notary, to or with whom any such person shall be bound, shall happen to die before the expiration of such term, or shall discontinue or leave off such his practice as aforesaid; or if such contract or indenture of apprenticeship shall, by mutual consent of the parties, be cancelled; or in case such clerk or apprentice shall be legally discharged before the expiration of such term, and such clerk or apprentice shall, in any of the said cases, be bound by another contract or contracts, indenture or indentures in writing, to serve, and shall accordingly serve in manner herein-

If any Master shall die, or leave off Practice, or any Indenture shall be cancelled by mutual consent, or any Apprentice shall be legally discharged, in such cases if Apprentices serve the

41 Geo. 3,
c. 79.

Residue of
Seven Years
with other
Masters, it
shall be effec-
tual, if an
Affidavit be
filed of the
Second Con-
tract.

Apprentices
bound after
Aug. 1, 1801,
before ad-
mission, to
file Affidavits
that they
have really
served Seven
Years.

If any No-
tary shall act
as such, or
permit his
Name to be
used for the
Profit of any
Person not
entitled to
act as a No-
tary, he shall
be struck off
the Roll.

Any Person
doing any
thing belong-
ing to the
Office of a
Notary with-
out being
admitted,
shall forfeit
Fifty Pounds.

Act not to
exclude any
Person from
admission
who hath
been bound
on or before
Jan. 1, 1801,
for Seven
Years, to any
Notary or
Person who
has actually
served as

before mentioned, as clerk or apprentice to any such public notary or scrivener (being also a public notary), as aforesaid, during the residue of the said term of seven years, then such service shall be deemed and taken to be as good, effectual and available, as if such clerk or apprentice had continued to serve as a clerk or apprentice for the said term of seven years to the same person to whom he was originally bound; so as an affidavit be duly made and filed of the execution of such second or other contract or contracts, within the time and in like manner as is herein-before directed concerning such original contract."

[Sect. 9. "That every person who, from and after the said first day of August, shall become bound as clerk or apprentice as aforesaid, shall, before he be admitted and inrolled a public notary according to this act, make before, and file with, the proper officer herein-before for that purpose mentioned, or cause the public notary, to whom he was bound, to make and file an affidavit that he hath actually and really served and been employed by such practising public notary, to whom he was bound as aforesaid, during the whole term of seven years, according to the true intent and meaning of this act."

[Sect. 10. "That, from and after the said first day of August, if any public notary shall act as such, or permit or suffer his name to be in any manner used for or on account, or for the profit and benefit, of any person or persons not entitled to act as a public notary, and complaint shall be made in a summary way to the court of faculties wherein he hath been admitted and inrolled, upon oath, to the satisfaction of the said court, that such notary hath offended therein as aforesaid, then and in such case every such notary so offending shall be struck off the roll of faculties, and be for ever after disabled from practising as a public notary, or doing any notarial act; save and except as to any allowance or allowances, sum or sums of money, that are or shall be agreed to be made or paid to the widows or children of any deceased public notary or notaries, by any surviving partner or partners of such deceased notary or notaries."

[Sect. 11. "That, from and after the said first day of August, in case any person shall, in his own name or in the name of any other person, make, do, act, exercise, or execute and perform, any act, matter, or thing whatsoever, in anywise appertaining or belonging to the office, function, and practice of a public notary, for or in expectation of any gain, fee, or reward, without being admitted and inrolled, every such person for every such offence, shall forfeit and pay the sum of fifty pounds, to be sued for and recovered in manner hereinafter mentioned."

[Sect. 12. "That this act, or any thing herein contained, shall not be taken or construed to exclude any person from being sworn, admitted, and inrolled a public notary, in the accustomed court aforesaid, who hath, on or before the first day of January, one thousand eight hundred and one, been bound by contract in writing or indenture of apprenticeship, to serve as a clerk or apprentice to any public notary or scrivener, being also a public notary, or any person who shall have actually served in the capacity of clerk or apprentice to any public notary or scrivener, being also a public

notary, for the term commencing before the first day of January, one thousand eight hundred and one, for the term of not less than seven years, notwithstanding such person shall not have been bound by contract in writing or indenture of apprenticeship, or that such term of seven years shall not expire till after the said first day of August; and provided that such clerk or apprentice shall, within six months after the passing of this act, enter into and become bound by contract in writing or indenture of apprenticeship, to any such public notary, and shall actually serve for the remainder of the term of seven years: provided always, that an affidavit shall be previously made and filed, in manner herein-before directed, of such actual service for any term not less than seven years, to any such qualified notary or scrivener; and every such person may, after the expiration of such term of seven years, and affidavit of such service having been previously made and filed as before directed, be sworn, admitted, and inrolled to be a public notary, in the same manner as persons to be admitted, sworn, and inrolled public notaries, are hereby required to be sworn, admitted, and inrolled respectively; any thing in this act contained to the contrary notwithstanding."

41 Geo. 3,
c. 79.

Clerk or Apprentice
Seven Years,
though not
bound by
Contract, &c.

[Sect. 13. "And whereas the Incorporated Company of Scriveners of London, by virtue of its charter, hath jurisdiction over its members being resident within the city of London, the liberties of Westminster, the borough of Southwark, or within the circuit of three miles of the said city, and hath power to make good and wholesome laws and regulations for the government and control of such members, and the said company of scriveners, practising within the aforesaid limits, and it is therefore expedient that all notaries resident within the limits of the said charter should come into and be under the jurisdiction of the said company; be it therefore enacted, That all persons who may hereafter apply for a faculty to become a public notary, and practise within the city of London and the liberties thereof, or within the circuit of three miles of the same city, shall come into and become members, and take their freedom of the said company of scriveners, according to the rules and ordinances of the said company, on payment of such and the like fine and fees as are usually paid and payable upon the admission of persons to the freedom of the said company, and shall, previous to the obtaining such faculty, be admitted to the freedom of the said company, and obtain a certificate of such freedom, duly signed by the clerk of the same company for the time being, which certificate shall be produced to the master of faculties, and filed in his office prior to or at the time of issuing any faculty to such person to enable him to practise within the jurisdiction of the said company."

Persons applying for a Faculty to become Notaries within the Jurisdiction of the Company of Scriveners, shall previously take their Freedom of the Company.

[Sect. 14. "That nothing in this act contained shall extend, or be construed to extend, to any proctor in any ecclesiastical court in England; nor to any secretary or secretaries to any bishop or bishops, merely practising as such secretary or secretaries; or to any other person or persons necessarily created a notary public for the purpose of holding or exercising any office or appointment, or occasionally performing any public duty or service under government, and not as general practitioner or practitioners; any

Act not to extend to Proctors in Ecclesiastical Courts, Secretaries to Bishops, &c.

41 Geo. 3,
c. 79.

thing herein-before contained to the contrary notwithstanding: provided always, that nothing herein contained shall extend or be construed to exempt any proctor, being also a public notary, from the pains, penalties, forfeitures, and disabilities, by this act imposed upon any public notary, who shall permit or suffer his name to be, in any manner, used for, or on account, or for the profit and benefit, of any person or persons, not entitled to act as a public notary."

Nor to Persons who, on or before passing this Act, have been admitted as Notaries.

[Sect. 15. "That nothing in this act contained shall extend, or be construed to extend, to prevent any person who, on or before the passing of this act, shall have been admitted as a public notary, from acting as a public notary, or using or exercising the office of a notary in any manner, or doing any notarial acts whatever."

Recovery and application of Penalties.

[Sect. 16. "That all pecuniary forfeitures and penalties imposed on any person or persons, for offences committed against this act, shall and may be sued for and recovered in any of his majesty's courts of record at Westminster, by action of debt, bill, plaint, or information, wherein no essoign, protection, privilege, wager of law, or more than one imparlance shall be allowed, and wherein the plaintiff, if he or she shall recover any penalty or penalties, shall recover the same for his or her own use, with full costs of suit.

Limitation of Actions.

[Sect. 17. "That if any action or suit shall be brought or commenced for any thing done in pursuance of this act, every such action or suit shall be commenced within three calendar months next after the fact committed, and not afterwards, and shall be laid and tried in the county wherein the cause of action shall have arisen, and not elsewhere; and the defendant or defendants in such action or suit, shall and may plead the general issue, and give this act, and the special matter, in evidence at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this act; and if the same shall appear to have been so done, or if any action or suit shall be brought after the time limited for bringing the same, or shall be laid in any other county or place than as aforesaid, then the jury shall find for the defendant or defendants; and upon such verdict, or if the plaintiff or plaintiffs shall be nonsuited, or suffer a discontinuance of his, her, or their action or suit, after the defendant or defendants shall have appeared, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall have treble costs, and shall have such remedy for the same as any defendant or defendants hath or have for costs of suit in any other case by law."

General Issue.

Treble Costs.

[The act of the 41 Geo. 3, c. 79, has been amended by the 3 & 4 W. 4, 3 & 4 Will. 4, c. 70, which is intituled "An Act to alter and amend an Act of the forty-first Year of His Majesty King George the Third, for the better Regulation of Public Notaries in England (h)," and enacts as follows:

41 Geo. 3, c. 79.

["Whereas by an act passed in the forty-first year of the reign of his late majesty King George the Third, intituled 'An Act for the better Regulation of Public Notaries in England,' it is enacted, that after the first day of August, one thousand eight hundred and

(h) Passed 28th August, 1833.

one, no person shall be sworn, admitted, and inrolled as a public notary, unless such person shall have been bound by contract in writing or by indenture of apprenticeship to serve as a clerk or apprentice for the term of not less than seven years to a public notary, or a person using the art and mystery of a scrivener, (according to the privilege and custom of the city of London, such scrivener being also a public notary,) duly sworn, admitted and inrolled, and shall have continued in such service for the said term of seven years; and certain other enactments are contained in the said act, regulating the admission and practice of notaries public: And whereas the provisions of the said act are in their operation found to be extremely inconvenient in some places distant from the city of London; be it therefore enacted, &c., That from and after the passing of this act so much of the said recited act as requires that persons to be admitted notaries public shall have served a clerkship or apprenticeship for seven years, as hereinbefore mentioned, shall, so far as the same affects persons being attornies, solicitors, or proctors admitted as hereinafter mentioned, be limited and confined to the city of London and liberties of Westminster, the borough of Southwark, and the circuit of ten miles from the Royal Exchange in the said city of London."

3 & 4 Will. 4.
c. 70.

Recited Act
limited to
London and
Ten Miles
thereof.

[Sect. 2. "That from and after the passing of this act it shall and may be lawful for the master of the Court of Faculties of his grace the Lord Archbishop of Canterbury in London from time to time, upon being satisfied as well of the fitness of the person as of the expediency of the appointment, to appoint, admit and cause to be sworn and inrolled in the said Court of Faculties any person or persons residing at any place distant more than ten miles from the Royal Exchange in the said city of London, who shall have been previously admitted, sworn and inrolled an attorney or solicitor in any of the courts at Westminster, or who shall be a proctor practising in any Ecclesiastical Court, to be a notary public or notaries public to practise within any district in which it shall have been made to appear to the said master of the Court of Faculties that there is not (or shall not hereafter be) a sufficient number of such notaries public admitted or to be admitted under the provisions of the said recited act for the due convenience and accommodation of such district, as the said master of the Court of Faculties shall think fit, and not elsewhere; any law or usage to the contrary notwithstanding (i)."]

Attornies may
be admitted
as Notaries
out of those
Limits,

[Sect. 3. "That nothing herein contained shall extend to authorize any notary who shall be admitted by virtue of this act to practise as a notary, or to perform or certify any notarial act whatsoever, within the said city of London, the liberties of Westminster, the borough of Southwark, or within the circuit of ten miles from the Royal Exchange in the said city of London."]

Not to authorize
Notaries
appointed
thereby to
act in London
or within
Ten Miles
thereof.

[Sect. 4. "That if any notary admitted by virtue of this act shall practise as a notary, or perform or certify any notarial act whatso-

Notary ad-
mitted under
this Act, prac-
tising out of
his District,
to be struck
off the Roll
of Faculties.

(i) [In the cases of *Dering and Brooke v. Wright*, (4th May, 1836,) *Hoskins v. Greetham*, (Feb. 1838,) caveats were issued against the grant of a faculty, and the causes were ar-

gued by counsel at Doctors' Commons before the master of the faculties. In the former case the faculty was granted, in the latter refused.—ED.]

3 & 4 Will. 4,
c. 70.

ever, out of the district specified and limited in and by the faculty to be granted to him by virtue of this act, or within the city of London, the liberties of Westminster, the borough of Southwark, or the circuit of ten miles from the Royal Exchange in London aforesaid, then and in every such case it shall be lawful for the said Court of Faculties, on complaint made in a summary way and duly verified on oath, to cause every such notary so offending to be struck off the roll of faculties, and every person so struck off shall thenceforth for ever after be wholly disabled from practising as a notary or performing or certifying any notarial act whatsoever; any thing herein contained to the contrary notwithstanding.”]

[An act of parliament required, that before a person should be allowed to act as a public notary he should have been admitted and inrolled in the court wherein notaries had been usually admitted; and that no person should be inrolled as a public notary unless he should have been bound by contract of apprenticeship to serve for seven years to a public notary, and during that term should have continued in such service; and further, that he should during the whole time and term of service specified in such contract of apprenticeship, or during the space of seven years thereof at least, continue and be actually employed by such public notary in the proper business of a public notary: Held, that a party bound apprentice for the term of seven years, who during the whole of that term acted as a banker's clerk daily till five o'clock in the evening, and after that hour went to the notary and presented bills of exchange, and prepared protests, was not actually employed by the public notary during the whole period of seven years within the meaning of the act of parliament, and consequently that he was not entitled to act as a notary; and this court refused a mandamus to the Scriveners' Company to admit such a party to the freedom of the company, in order that he might be admitted to practise as a notary (1).—ED.]

How sworn.

3. A notary on his appointment must swear, “that he will faithfully exercise the office of notary public; that he will faithfully make contracts, wherein the consent of parties is required, by adding or diminishing nothing, without the will of the parties, that may alter the substance of the fact; that if in making any instrument the will of one party only is required, he will in such case add or diminish nothing that may alter the substance of the fact, against the will of such party; that he will not make instruments of any contract in which he shall know there is a violence or fraud; that he will reduce contracts into an instrument or register; and after he shall have so reduced the same, that he will not maliciously delay to make a public instrument thereupon, against the will of him or them, on whose behalf such contract is to be so drawn: Saving to himself his just and accustomed fees.”

(1) [*Rex v. The Scriveners' Company*, 10 B. & C. 511.]

4. A notary public (or actuary) that writes the acts of court, ought not only to be chosen by the judge, but approved also by each of the parties in suit; for though it does of common right belong to the office of the judge, to assume and choose a notary for reducing the acts of court in every cause into writing, yet he may be refused by the litigants: for the use of a notary was intended, not only on account of the judge, to help his memory in the cause, but also that the litigants might not be injured by the judge (*m*).

His Office in
the Contesta-
tion of Suit.

And particularly, the office of a notary in a judicial cause is employed about three things: first, he ought to register and enrol all the judicial acts of the court, according to the decree and order of the judge, setting down in the act the very time and place of writing the same; secondly, he ought to deliver to the parties, at their especial request, copies and exemplifications of all such judicial acts and proceedings as are there enacted and decreed; and thirdly, he ought to retain and keep in his custody the originals of such acts and proceedings, commonly called the *protocols* (*πρωτα κωλα*, the *notes*, or *first draughts*).

5. As a notary is a public person, so consequently all instruments made by him are called public instruments; and a judicial register of record made by him is evidence in every court, according to the civil and canon law. And a bishop's register establishes a perpetual proof and evidence, when it is found in the bishop's archives; and credit is given not only to the original, but even to an authentic copy exemplified (*n*).

Authenticity
of his Pro-
ceedings.

And one notary public is sufficient for the exemplification of any act; no matter requiring more than one notary to attest it (*o*).

And the rule of the canon law is, that one notary is equal to the testimony of two witnesses: [*unus notarius æquipollet duobus testibus* (*p*).—ED.]

6. By the several Stamp Acts, the admission of a notary shall be upon a 30*l.* stamp. Stamps.

And every notarial act shall be on a 5*s.* stamp. [See 55 Geo. 3, c. 84, s. 1, and title *Faculty*.]

[In the catalogue of processes in the registry of High Court of Delegates, from 1609 to 1823, will be found the following record: "No. 590. *Williams v. Gentry*. In 1*ma* inst. Off. Judicis (Bishop of St. David's) promoted by Gentry against Williams;" as it should seem, for acting as notary without a regular faculty. It has been said, however, that, by sect. 17 of 25 Hen. 8, the

(*m*) Ayl. Par. 382.

(*n*) Ibid. 386.

(*o*) Ibid.

(*p*) Gibs. Codex, p. 996. ["Be-
sides I know thou art a public notary,

and such stand in law for a dozen witnesses," is Massinger's allusion to this *dictum*, in the mouth of Sir Giles Overreach.—*New Way to pay Old Debts*, act 5.—ED.]

appeal from the master of the faculties lies to the lord chancellor (q).

[The following opinion was given by the attorney-general upon various points respecting the act for the abolition of unnecessary oaths (r), 5 & 6 Will. 4, c. 62, submitted for his opinion by the Society of Public Notaries of London :

[" You are requested to advise the Society of Public Notaries of London,—

[" 1st. Whether, under the above act of 5 & 6 Will. 4, s. 15, a notary public, duly admitted and practising, be authorized to receive the solemn declarations mentioned in the said section ?

[" I think there is no doubt whatever that a notary is authorized to receive the solemn declarations referred to. The authority is expressly given, and there is nothing in the act to restrict or qualify it.

[" 2ndly. Whether, by the same section, the provisions of the act extend to debts, &c. due to residents in Great Britain and Ireland, by persons resident in foreign states, in like manner as to debts, &c. in his majesty's colonies ?

[" I do not think that the 15th section extends to debts due by persons resident in foreign states.

[" 3rdly. Whether the blank in the schedule of the act for the year of the reign should be supplied by the words ' fifth and sixth years of the reign,' &c. or by the word ' sixth' year, the royal assent having been given in the sixth year of his majesty's reign ?

[" The blank in the schedule ought to be filled up with the word ' sixth' only. No single act of parliament can be passed in two years of the king's reign. " J. CAMPBELL.

[" *Temple, Sept. 30, 1835.*"

[*Form of a Faculty appointing a Notary Public.*

[" —, by Divine Providence Archbishop of Canterbury, Primate of all England, and Metropolitan, by authority of Parliament, lawfully empowered for the purposes herein written: To our beloved in Christ, —, a literate person now residing —, health and grace: We being willing, by reason of — [or, " Whereas it has been made known to our master of the faculties that there is an insufficient number of notaries at — (s): we therefore, by reason of the premises, and of"] your merits, to confer on you a suitable title of promotion, do create you a public notary; previous examination, and the other requisites, to be herein observed, having been had: And do out of our favour towards you admit you into the number and society of other notaries, to the end that you may henceforward in all places [clause of exception or limitation] exercise such office of notary: — hereby decreeing, that full faith ought to be given, as well in judgment as thereout, to the instruments to be from this time made by you; the oaths hereunder written

(q) [Vide supra.]

p. 29.]

(r) [See this act post, title Oaths,

(s) [See 3 & 4 Will. 4, c. 70.]

having been by us, or our master of the faculties, first required of you and by you taken.

["I, —, do sincerely promise and swear, that (saving the right of any issue of his late majesty King William the Fourth, which may be born of his late majesty's consort,) I will be faithful and bear true allegiance to her majesty Queen Victoria. So help me God.

["I, —, do swear, that I do, from my heart, abhor, detest, and abjure as impious and heretical that damnable doctrine and position, that princes excommunicated or deprived by the Pope, or any authority of the see of Rome, may be deposed or murdered by their subjects, or any other whatsoever: And I do declare, that no foreign prince, person, prelate, state, or potentate, hath, or ought to have, any power, jurisdiction, superiority, pre-eminence or authority, ecclesiastical or spiritual, within this realm. So help me God.

["I, —, do swear that I will faithfully exercise the office of a notary public. I will faithfully make contracts wherein the consent of parties is required, by adding or diminishing nothing without the will of such parties, that may alter the substance of the fact. But if in making any instrument, wherein the will of one party alone is required, this I will also do, to wit, I will add or diminish nothing that may alter the substance of the fact against the will of the party himself. I will not make instruments of any contract in which I shall know there is violence or fraud. I will reduce contracts into an instrument or register: And after I shall have so reduced the same, I will not maliciously delay to make a public instrument thereupon against the will of him or them on whose behalf such contract is to be so drawn; saving to myself my just and accustomed fee. So help me God.

[Here is inserted an oath as to the seven years' service, if under 41 Geo. 3, c. 79.]

["Provided always, that these presents do not avail you any thing, unless duly registered and subscribed by the clerk of her majesty for faculties in chancery. Given under the seal of our office of faculties, at Doctors' Commons, this — day of —, in the year of our Lord one thousand eight hundred and —, and in the — year of our translation."—ED.]

Nobel Disseisin.

THE writ of assise of novel disseisin (*novæ disseisinæ*) lieth, where tenant for life, or tenant in fee simple, or in tail, is disseised of his lands or tenements, or put out thereof against his will (*t*).

November the Fifth—See Holidays.

Nuncupative Will—See Wills.

Oaths. (u)

1. *In what Cases to be taken* 14
2. *In what Cases abolished by 5 & 6 Will. 4, c. 62* 29

I. *In what Cases to be taken.*

Lawfulness of
an Oath.

1. “**NONE** shall bring into dispute the determinations of the Church, concerning oaths to be taken in the ecclesiastical or in the temporal courts; on pain of being declared an heretic (x).”

“As we confess that vain and rash swearing is forbidden Christian men by our Lord Jesus Christ, and James his apostle; so we judge that Christian religion doth not prohibit, but that a man may swear when the magistrate requireth, in a cause of faith and charity, so it be done according to the prophet’s teaching, in justice, judgment, and truth (y).”

The giving of every oath must be warranted by act of parliament, or by the common law time out of mind (z).

Oath *ex*
officio.

2. The oath *ex officio*, is an oath whereby any person may be obliged to make any presentment of any crime or offence, or to confess or accuse himself or herself, of any criminal matter or thing, whereby he or she may be liable to any censure, penalty or punishment whatsoever.

By a canon of Archbishop Boniface: “Laymen shall be compelled by excommunication, if need be, to take an oath to speak the truth, when inquiry shall be made by the prelates and judges ecclesiastical, for the correction of sins and excesses (a).”

Afterwards, E., 4 Jac., in the time of the parliament, the lords of the council at Whitehall demanded of Popham and Coke, Chief Justices, upon motion made by the Commons in parliament, in what cases the ordinary may examine any person *ex officio* upon oath. And upon good consideration and view of the books, they answered to the lords of the council at another day in the council chamber: 1. That the ordinary cannot constrain any man, ecclesiastical or temporal, to swear generally to answer to such interrogatories as shall be administered unto him; but ought to deliver to him the articles upon which he is to be examined, to the intent that he may know whether he ought by the law to answer to them. And so is the course of the chancery; the defendant hath a copy of the bill delivered unto him, or otherwise he need not to answer it. 2. That no man, ecclesiastical or temporal, shall be examined upon the secret thoughts of his heart, or of his secret opinion; but something ought to be objected against him, which he hath spoken or done. 3. That no layman may be examined *ex officio*, except

(u) [See titles **Dissenters, Popery.**]

(x) Arund. Lind. 297.

(y) Art. 39.

(z) 2 Inst. 73.

(a) Lind. 109.

in two causes (matrimonial and testamentary); and that was founded upon great reason: for laymen for the most part are not lettered, wherefore they may easily be inveigled and intrapped, and principally in heresies and errors (b).

Again, H., 13 Jac., *Dighton* and *Holt's case* (c). They were committed by the high commissioners, because they refused to take the oath *ex officio*; whereupon an *habeas corpus* being awarded, it was returned, that they were committed, because they being convented for slanderous words, against the Book of Common Prayer and the government of the Church, and being tendered the oath to be examined upon these causes, they refused, and were therefore committed. And after three terms' deliberation, the court now gave their resolution, that they ought to be delivered. And the reason thereof Coke, Chief Justice, declared to be, because this examination is made to cause them to accuse themselves of the breach of a penal law; which is against law, for they ought to proceed against them by witnesses, and not inforce them to take an oath to accuse themselves (c).

Finally, by the statute of 13 Car. 2, c. 12, it is enacted, "that it shall not be lawful for any person exercising ecclesiastical jurisdiction, to tender or administer to any person whatsoever, the oath usually called the oath *ex officio*, or any other oath, whereby such person to whom the same is tendered or administered may be charged or compelled to confess, or accuse, or to purge him or herself of any criminal matter or thing, whereby he or she may be liable to censure or punishment."

But in other cases, where the course of the ecclesiastical courts hath been to receive answers upon oath, they may still receive them. And therefore in the case of *Hern v. Brown*, T., 31 Car. 2 (d), where a suit was for payment of the proportion assessed towards the repair of the church, the defendant offering to give in his answer, but not upon oath, prayed a prohibition, because it was refused. The court, after hearing arguments, denied the prohibition; for they said, it was no more than the chancery did, to make defendants answer upon oath in such like cases.

And some years before that in the case of *Goulson v. Wainwright* (e), it was held by the court, that if articles *ex officio* are exhibited in the spiritual court for matters *criminal*, and the party is required to answer upon oath, he may have a prohibition: but if it be a *civil* matter, he cannot do so, for then he is bound to answer (e).

[In *Schultes v. Hodgson* (f) Sir John Nicholl said, "This is a criminal suit, and I am clear that in a criminal suit under

(b) 12 Co. 26.

(c) Cro. Jac. 388.

(d) Gibs. 1011; 1 Ventr. 339.

(e) Gibs. 1011; 1 Sid. 374.

(f) [1 Add. 110.]

the statute of Car. 2 the answers on oath of the defendant are not to be required." The practice has been changed in this respect since Oughton's time by the statute. "It may indeed be the modified practice in civil suits founded on criminal imputations, it is clearly not the practice at all in suits directly criminal. For instance, if adultery be proceeded against by libel *quoad petendum divortium*, the defendant's answers may be (though seldom are) taken to such parts of the libel as involve no direct or implied charge of adultery."—ED.]

Oath of
Calumny.

3. The oath of *calumny* was required by the Roman law, of all persons engaged in any lawsuit, obliging both plaintiffs and defendants, at the beginning of the cause, to swear that their demands and their defences were sincere and upright, without any intention to give unnecessary trouble, or to use quirks and cavils (*g*).

And by a legatine constitution of Otho it is thus ordained: "The oath of calumny, in causes ecclesiastical and civil, for speaking the truth in spirituals, whereby the truth may be more easily discovered, and causes more speedily determined, we ordain for the future to be taken in the kingdom of England, according to the canonical and legal sanction, the custom obtained to the contrary notwithstanding (*h*)."

The Oath of Calumny.]—Which oath was this:

"You shall swear, That you believe the cause you move is just: That you will not deny any thing you believe is truth, when you are asked of it: That you will not (to your knowledge) use any false proof: That you will not out of fraud request any delay, so as to protract the suit: That you have not given or promised any thing, neither will give or promise any thing, in order to obtain the victory, except to such persons, to whom the laws and the canons do permit: So help you God (*i*)."

Of Calumny.]—*Jusjurandum calumniæ; sc. vitandæ*: for the avoiding of calumny (*k*).

To be taken.]—And this both by the plaintiff and the defendant. Which if they shall refuse respectively, the plaintiff in such case shall lose his cause, and the defendant shall be taken as having confessed (*l*).

The Custom obtained to the contrary notwithstanding.]—By this it appeareth that, by the custom of the realm of England, the oath of calumny was not to be administered. Nevertheless this custom was not so general as in this canon is alleged. The case was thus: *Laymen* were free by the custom of the realm from taking of that oath, unless it were in causes *matrimonial* and *testamentary*; and in those two cases the ecclesiastical judge might examine the parties upon their oath, because contracts of matrimony, and the estates of the dead,

(*g*) 1 Domat, 439.

(*h*) Athon, 60.

(*i*) Conset. 91.

(*k*) Athon, 60.

(*l*) Ibid.

are many times secret, and do not concern the shame and infamy of the party, as adultery, incontinency, simony, heresy, and such like. And this appeareth by two writs in the register, directed to the sheriff, to prohibit the ordinaries from calling laymen in that oath against their wills, except in those two cases (m).

But this custom extended not to those of the clergy, but to lay people only; for that they of the clergy, being presumed to be learned men, were better able to take the oath of calumny (n).

But if, in a penal law, the jurisdiction of the ordinary be saved, as by 1 Eliz., for hearing of masses, or by 13 Eliz. for usury, or the like, neither clerk nor layman shall be compelled to take the oath of calumny; because it may be an evidence against him at the common law, upon the penal statute (o).

This oath had long continuance in the ecclesiastical court: and it had the warrant of an act of parliament, in 2 Hen. 4, c. 15, whereby it was enacted, that diocesans shall proceed *according to the canonical sanctions*; which act was repealed by 25 Hen. 8, c. 24, but was revived in the reign of Queen Mary, and then all the martyrs who were burnt were examined upon their oaths; and then again by the 1 Eliz. c. 1, it was finally repealed. And the matter touching this oath at this day standeth thus: It is confessed, as well by the said provincial constitution of Otho, as by the register, that the said constitution was against the custom of the realm: and no custom of the realm can be taken away by a canon of the church, but only by act of parliament; and especially in case of an oath, which is so sacred a thing, and which generally concerneth all the nobility, gentry, and commonalty of the realm of both sexes: And by the statute of the 25 Hen. 8, c. 19, no canon against the king's prerogative, the law, statutes, or custom of the realm is of force; which is but declaratory of the common law (p).

So that the result of the matter, upon these premises, will be this: So far as this constitution was against the custom of the realm, it is of no avail: so far as it is warranted by the custom, it is still of force; and consequently extendeth to the clergy, and to laymen in cases matrimonial and testamentary, and also to persons who take the said oath voluntarily, and not by compulsion.

For the writs in the register do only require, that laymen be not compelled to answer *against their will*; so that if any assent to it, and take it without exception, this standeth with law (q).

4. The *voluntary* or *decisive* oath, is given by one party to

The Voluntary
or Decisive
Oath.

(m) 2 Inst. 657; 12 Co. 26; Gibs.
1011.

(n) 2 Inst. 657.

(o) 2 Inst. 657; 12 Co. 27.

(p) 2 Inst. 658; 12 Co. 29.

(q) 12 Co. 27.

the other, when one of the litigants, not being able to prove his charge, offers to stand or fall by the oath of his adversary; which the adversary is bound to accept, or to make the same proposal back again, otherwise the whole shall be taken as confessed by him (*r*).

And this seemeth to have some foundation in the common law, in what is called *waging of law*; which is a privilege that the law giveth to a man, by his own oath to free himself, in an action of debt upon a simple contract (*s*).

But this oath, in the ecclesiastical courts, is now obsolete and out of use (*t*).

Oath of Truth.

5. The oath of *truth*, is when the plaintiff or defendant is sworn upon the libel or allegation to make a true answer of his knowledge as to his own fact, and of his belief of the fact of others. This differs from the former, for it is not decisive; and the plaintiff or defendant may proceed to other proofs, or prove the contrary to what is sworn (*u*).

Oath of Malice.

6. The oath of *malice*, is when the party proponent swears that he doth not propose such a matter or allegation out of malice, or with an intent unnecessarily to protract the cause (*x*).

And this oath may be administered at any time during the suit, at the judge's discretion, whether the parties consent to it or not (*y*).

Suppletory Oath.

7. The *necessary* or *suppletory* oath, is given by the judge to the plaintiff or defendant, upon half proof already made. This, being joined to the half proof, *supplies* and gives sufficient power to the judge to condemn or absolve. It is called the *necessary* oath, because it is given out of necessity, at the instance of the party, whether the other party will consent to it or not. But when the judge doth administer it, he ought first to be satisfied that there is an half proof already made, by one unexceptionable witness, or by some other sort of proof. If the cause is of an high nature, and there is a temptation to perjury; or if it is a criminal cause; or if more witnesses might be produced to the same fact; then this oath cannot take place (*z*).

Before the Delegates at Serjeants' Inn, January 22nd, 1717. *Williams v. Lady Bridget Osborne* (*a*). The question below was, whether Mr. Williams was married to the Lady Bridget Osborne; the minister who performed the ceremony having formerly confessed it extra-judicially, but now denying it upon oath. So that there being variety of evidence on both sides, the judge, upon hearing the cause, required, according to the

(*r*) Wood, Civ. L. 314; *Qui jurandum defert prior de calumnia debet jurare, si hoc exigatur*, Dig. 12, 2, 34, s. 4.

(*s*) 1 Inst. 155, 157; 2 Inst. 45.

(*t*) 1 Ought. 176.

(*u*) Wood, Civ. L. 314.

(*x*) 1 Ought. 158.

(*y*) Ibid.

(*z*) Wood, Civ. L. 314; Ayl. Par. 391.

(*a*) Str. 80.

method of ecclesiastical courts, the oath of the party, which the civilians term the suppletory oath, that he was really married as he supposeth in his libel and articles. The accepting this oath (as was agreed on both sides) is discretionary in the judge, and is only used where there is but what the civilians esteem a *semiplena probatio*; for if there be full proof, it is never required; and if the evidence doth not amount to a half proof, it is never granted, because this oath is not evidence strictly speaking, but only confirmation of evidence; and if that evidence doth not amount to a half proof, a confirmation of it by the party's own oath will not alter the case. Upon admitting the party to his suppletory oath, the lady appeals to the Delegates. So that the question now was not upon the merits, whether there really was a marriage or not, but only upon the course of the ecclesiastical courts, whether the judge in this case ought to have admitted Mr. Williams to his suppletory oath, as a person that had made an half proof of that which he was then to confirm. The questions before the Delegates were two: first, whether the suppletory oath ought to be administered in any case to enforce a half proof; and, secondly, admitting it might, whether the evidence in this case amounted to a half proof, so as to entitle Mr. Williams to pray that his suppletory oath might be received. As to the first, it was argued to be against all the rules of the common law that a man should be a witness in his own cause. It is not allowed in the temporal courts in any case but that of a robbery, which being presumed to be secret, the party is admitted to be a witness for himself. In the temporal courts no man can be examined that has any interest, though he be no party to the suit. On the other side many authorities and precedents were cited out of the civil law, to prove this practice of allowing a suppletory oath. And therefore the court held, that by the canon and civil law, the party agent, making a half proof, was entitled to pray that his suppletory oath might be received; and though it be against the rules of the common law, yet this being a cause of ecclesiastical cognizance, the civil and not the common law is to be the measure of their proceedings; and therefore this practice being agreeable to the civil law, is well warranted in all cases where the civil law is the rule, and the exercise of it lies in the discretion of the judge. Secondly, it being therefore established that a person making half proof is entitled to his oath, the next question was, what is, according to the notion of the civilians and canonists, a half proof. With them it was argued on the behalf of the lady, that nothing is esteemed as a *full* proof, unless there be two positive unexceptionable witnesses to the very matter of fact as to the marriage; that a half proof, which is the next degree of evidence, is what is affirmed by the oath of one witness as to the principal fact, and confirmed by concurrent

circumstances. It must be by *one* witness; it must be evidence that concludes necessarily, and not by presumption; there must be no presumption to encounter it; and the witness must be of good repute. That matrimonial causes require the greatest certainty; and where that is the sole question, the proof ought to be fuller than where it comes in by incident, as on granting administration. To this it was answered on the other side, that half proof implies no more than what the common lawyers call presumptive evidence; and that is properly called presumptive evidence which hath no one positive witness to support it, but relies only on the strength of circumstances. And when there is one witness who deposeth directly to the principal fact, this immediately ceaseth to bear the name of presumption, and assumes that of positive evidence. And that which in the temporal courts passeth for positive evidence, is the same degree of evidence with the full proof of the canonists and civilians. The suppletory oath doth *ex vi termini* import, that there has been no one positive witness to the principal fact, and he that demands to be admitted to take his oath, doth thereby admit that he hath produced no conclusive evidence to the point in issue, and therefore the party himself supplies the place of the witness. There is no fixing the bounds of an half proof; for in many cases, circumstances may overbear positive evidence; and then if those circumstances should not be esteemed to amount to an half proof, when the positive evidence would exceed it, that would be to overthrow the positive evidence by that which is not so strong. Half proof therefore they concluded to be, that degree of evidence which would incline a reasonable man to either side of the question; and implies in the notion of it, that a positive witness hath not deposed to the principal fact. And in this case, though there was no positive conclusive evidence, but only such as depended on circumstances, as confessions, and letters, and unusual familiarities, yet the court thought it amounted to an half proof (*b*), and consequently that the Dean of the Arches had done right, in admitting Mr. Williams to his suppletory oath: and therefore they dismissed the appeal, with 150*l.* costs.

[In *Louder v. Louder* (*c*), on proof of the wife's guilt, the court called for an affidavit from the husband explanatory of his delay to bring the suit, and being satisfied therewith, pronounced the sentence (*d*).—ED.]

The party praying this oath, must exhibit a schedule engrossed, with his hand to it, wherein is written so much as is proved more than half proof, or half proof; and must take his oath to speak the truth of his own certain knowledge (*e*).

According to civilians, this oath is not tendered by either

(*b*) See *Evidence*, 1, in note.

(*c*) [3 Hagg. 155.]

(*d*) [See also *Best v. Best*, 2 Phill.

611; and the recent case of *Taylor v. Morley*, 1 Curt. 482.—ED.]

(*e*) 1 Ought. 177.

party, but required by the judge *inopiâ probationum*, and it is either *suppletory* or *purgatory*, according as it is tendered to the plaintiff or defendant; but they agree that it ought rarely to be used, the maxim being, *actore non probante, reus absolvitur* (*f*).

8. By the ancient canon law, a proctor having a special proxy may take the oath of calumny, and may swear *in animam domini*, upon the soul of his client (*g*). Oath in Animam Domini.

But by Can. 132, "It is ordained, that forasmuch as in the probate of testament and suits for administration of the goods of persons dying intestate, the oath usually taken by proctors of courts, *in animam constituentis*, is found to be inconvenient; therefore, from henceforth, every executor, or suitor for administration, shall personally repair to the judge in that behalf, or his surrogate, and in his own person (and not by proctor) take the oath accustomed in these cases."

9. The oath *in litem*, or of *damages*, is that by which the plaintiff estimates the damages in the loss of any thing, and which the judge may allow or moderate (*h*). Oath of Damages.

10. The oath of *expenses* and *costs*, is where the litigant (which gained the sentence or decree), upon the taxing of costs, affirms upon his oath that these charges were necessarily expended by him in the prosecution of his suit (*i*). Oath of Costs.

All these oaths are unknown to the common law, but they were all used in the courts governed by the civil or canon law (*k*).

But they are only made use of in civil causes, and cannot be properly applied to criminal (*l*).

But the oath next following regardeth only criminal cases: That is to say,

11. The oath of purgation; which oath was administered where the defendant was suspected to be guilty, and if he swore that he was innocent, and produced honest men for his compurgators, he was to be discharged. If he could not bring such compurgators, to swear that they also believed him innocent, he was esteemed as convicted of such crime (*m*). Oath of Purgation.

But by the aforesaid act of the 13 Car. 2, c. 12, It shall not be lawful for any person exercising ecclesiastical jurisdiction, to tender or administer to any person, any oath whereby such person to whom the same is tendered or administered, may be charged or compelled to confess, or accuse, or to *purge* him or herself of any criminal matter or thing, whereby he or she may be liable to censure or punishment.

12. Besides the above recited, there are also divers other Other Oaths of use in the Courts.

(*f*) See Huber ad Dig. 12, 2, 12.

(*g*) Wood, Civ. L. 298.

(*h*) Ibid. 314.

(*i*) Ibid.

(*k*) Wood, Civ. L. 314.

(*l*) Ibid. 333.

(*m*) Ibid. 332.

oaths of use in the courts: As, the oath of the proctor, that he hath not questioned the witnesses; the oath of the proctor, concerning his bill of costs; the oath of the party, for the obtaining of absolution, that he will stand to the law, and obey the commands of the church; the oath of the party, on his being admitted *in formâ pauperis*; the oath of the party, concerning matter newly come to his knowledge; the oath of the party, that he believes he can prove the matter alleged; the oath of a creditor, concerning his debt; the oath of an executor, administrator, accountant, churchwardens, questmen, curates, preachers, schoolmasters, physicians, surgeons, midwives, and other such like (*n*).

Oath of
Allegiance.

13. The oath of *allegiance* is very ancient: and by the common law, every freeman at his age of twelve years was required, in the leet (if he were in any leet), or in the tourn (if he were not in any leet), to take the oath of allegiance (*o*).

But the clergy, not being bound to attend at the tourn or leet, were consequently so far exempted from taking this oath of allegiance (*p*).

But they were bound nevertheless to do homage to the king, for the lands held of him in right of the church (*q*).

Oath of
Supremacy.

14. The oath of *supremacy* came in after the Reformation, in consequence of abolishing the papal authority. And this oath all clergymen especially were bound to take.

Oath of
Abjuration.

15. The oath of *abjuration* came in after the Revolution; received some alterations in the first year of Queen Anne; and again in the first year of King George the First; and finally in the sixth year of King George the Third. And this oath, together with the oaths of allegiance and supremacy, all clergymen as well as others are bound to take, on their being promoted to offices (*r*).

Oaths of
Quakers.

16. In all cases wherein by any act of parliament an oath shall be allowed, authorized or required, the solemn affirmation or declaration of any of the people called Quakers shall be allowed instead of such oath, although no particular or express provision be made for that purpose in such act (*s*).

And if any person making such affirmation or declaration, shall be lawfully convicted of having wilfully, falsely, and corruptly affirmed or declared any matter or thing, which if the same had been deposed upon oath in the usual form would have amounted to wilful and corrupt perjury; he shall suffer as in cases of perjury (*t*).

But no Quaker by virtue hereof shall be qualified or permitted to give evidence in any criminal cases, or to serve on

(*n*) 1 Ought. 176.

(*o*) 2 Inst. 73.

(*p*) 2 Inst. 121; 1 H. H. 64.

(*q*) 1 H. H. 71, 72.

(*r*) [See *Dissenters*.]

(*s*) 22 Geo. 2, c. 46, s. 36.

(*t*) Ibid.

juries, or to bear any office or place of profit in the government (u).

17. By the 22 Geo. 2, c. 30, "Every person being a member of the Protestant Episcopal Church, known by the name of *Unitus Fratrum*, or the United Brethren, which church was formerly settled in Moravia and Bohemia, and are now in Prussia, Poland, Silesia, Lusatia, Germany, the United Provinces, and also in his majesty's dominions, who shall be required to take an oath, shall be allowed instead of such oath to make their solemn affirmation: But this not to qualify them to give evidence in a criminal cause, or to serve on juries." Of the Moravians.

18. Such oaths ought to be imposed on Heathens and Jews, which they allow to be obligatory (x). Of Infidels or Aliens.

Thus a Jew is to be sworn upon the Old Testament; and perjury upon the statute may be assigned upon this oath (y). Jews.

And when Jews take the oath of abjuration, the words [*on the true faith of a Christian*] shall be omitted (z).

Thus also Mahometans shall be sworn upon the Koran (a). Mahometans.

In the case of *Omichund v. Barker*, H., 18 Geo. 2 (b), a commission issued out of Chancery, to take the answer of Omichund the defendant, and the depositions of several witnesses, who were heathens of the Gentou religion, in their own country manner, at Calcutta in the East Indies; and the commission being executed and returned, the depositions were allowed to be read in the Court of Chancery, by Lord Hardwicke, assisted by the two lords chief justices and the lord chief baron. The manner of taking which oath was thus: There were three Brahmins or priests present, and the oath being interpreted to each witness, the witness touched the feet of one of the Brahmins, and two being Brahmins or priests did touch his hand.

At the rebel assizes at Carlisle, in the year 1745, many of the Scotch witnesses refusing to be sworn otherwise than in their own country manner; the judges so far submitted, as to allow them to be sworn after the Scotch manner for finding the bills by the grand jury, but did not admit it upon the trials (c).

[On the 9th of May, 1828, an act was passed for repealing so much of several acts as imposed the necessity of receiving the sacrament of the Lord's Supper as a qualification for certain offices and employments. These statutes were the 13 Car. 2, st. 2, c. 1, and 25 Car. 2, c. 2, commonly called "The Test and Corporation Acts (d)."] The other statute repealed was Oaths and Declarations to qualify for Offices.

(u) 22 Geo. 2, c. 46, s. 37.

(x) Wood, Civ. L. 313.

(y) 2 Keb. 314.

(z) 10 Geo. c. 4, s. 18.

(a) Str. 1104.

(b) 2 Abr. Eq. Cas. 397.

(c) [See the third chapter of the 1st

vol. of Mr. Phillipps' work on the Law of Evidence, "Of Incompetency from Defect of Religious Principle."—Ed.]

(d) [They were originally framed to exclude by an indirect blow the Duke of York (James II.) from the throne.—Ed.]

the 16 Geo. 2, c. 30, the object of which was to indemnify persons who had not complied with the provisions of the acts of Charles II. The 9 Geo. 4, c. 17, repealing by its first section all the above statutes, proceeds to enact,—

9 Geo. 4,
c. 17.

Declaration
to be made in
lieu of the
Sacramental
Test.

[Sect. 2. “‘ And whereas the Protestant Episcopal Church of England and Ireland, and the doctrine, discipline and government thereof, and the Protestant Presbyterian Church of Scotland, and the doctrine, discipline and government thereof, are by the laws of this realm severally established, permanently and inviolably : And whereas it is just and fitting, that on the repeal of such parts of the said acts as impose the necessity of taking the Sacrament of the Lord’s Supper according to the rites or usage of the Church of England, as a qualification for office, a declaration to the following effect should be substituted in lieu thereof;’ Be it enacted, That every person who shall hereafter be placed, elected or chosen in or to the office of mayor, alderman, recorder, bailiff, town-clerk, or common councilman, or in or to any office of magistracy, or place, trust, or employment relating to the government of any city, corporation, borough, or cinque port, within England and Wales or the town of Berwick upon Tweed, shall within one calendar month next before or upon his admission into any of the aforesaid offices or trusts, make and subscribe the declaration following.”

Form of De-
claration.

[“‘ I, A. B., do solemnly and sincerely, in the presence of God, profess, testify and declare, upon the true faith of a Christian, that I will never exercise any power, authority or influence which I may possess by virtue of the office of — to injure or weaken the Protestant Church as it is by law established in England, or to disturb the said church, or the bishops and clergy of the said church, in the possession of any rights or privileges to which such church, or the said bishops and clergy are or may be by law entitled.’ ”

Declaration
to be sub-
scribed before
Magistrates,
&c.

[Sect. 3. “ That the said declaration shall be made and subscribed as aforesaid in the presence of such person or persons respectively, who by the charters or usages of the said respective cities, corporations, boroughs, and cinque ports, ought to administer the oath for due execution of the said offices or places respectively, and in default of such, in the presence of two justices of the peace of the said cities, corporations, boroughs, and cinque ports, if such there be, or otherwise in the presence of two justices of the peace of the respective counties, ridings, divisions, or franchises wherein the said cities, corporations, boroughs, and cinque ports are ; which said declaration shall either be entered in a book, roll or other record, to be kept for that purpose, or shall be filed amongst the records of the city, corporation, borough, or cinque port.”

In case of
Neglect to
make the De-
claration,
Election to
be void.

[Sect. 4. “ That if any person placed, elected, or chosen into any of the aforesaid offices or places, shall omit or neglect to make and subscribe the said declaration in manner above-mentioned, such placing, election, or choice shall be void ; and that it shall not be lawful for such person to do any act in the execution of the office or place into which he shall be so chosen, elected or placed.”

Persons ad-
mitted into
any Office

[Sect. 5. “ That every person who shall hereafter be admitted into any office or employment, or who shall accept from his majesty,

his heirs and successors, any patent, grant or commission, and who, by his admittance into such office or employment, or place of trust, or by his acceptance of such patent, grant or commission, or by the receipt of any pay, salary, fee, or wages by reason thereof, would by the laws in force immediately before the passing of this act have been required to take the Sacrament of the Lord's Supper according to the rites or usage of the Church of England, shall within six calendar months after his admission to such office, employment, or place of trust, or his acceptance of such patent, grant, or commission, make and subscribe the aforesaid declaration, or in default thereof his appointment to such office, employment, or place of trust, and such patent, grant, or commission, shall be wholly void."

9 Geo. 4,
c. 17.

which heretofore required the taking of the Sacrament, shall make the Declaration within Six Months, or the Appointment to be void.

[Sect. 6. "That the aforesaid declaration shall be made and subscribed in his majesty's High Court of Chancery, or in the Court of King's Bench, or at the quarter sessions of the county or place where the persons so required to make the same shall reside; and the court in which such declaration shall be so made and subscribed shall cause the same to be preserved among the records of the said court."

Declaration to be made in the Court of Chancery or King's Bench, or at the Quarter Sessions.

[Sect. 7. "That no naval officer below the rank of rear-admiral, and no military officer below the rank of major-general in the army or colonel in the militia, shall be required to make or subscribe the said declaration, in respect of his naval or military commission; and that no commissioner of customs, excise, stamps, or taxes, or any person holding any of the offices concerned in the collection, management, or receipt of the revenues which are subject to the said commissioners, or any of the officers concerned in the collection, management, or receipt of the revenues subject to the authority of the postmaster-general, shall be required to make or subscribe the said declaration, in respect of their said offices or appointments: provided also, that nothing herein contained shall extend to require any naval or military officer, or other person as aforesaid, upon whom any office, place, commission, appointment, or promotion shall be conferred during his absence from England, or within three months previous to his departure from thence, to make and subscribe the said declaration until after his return to England, or within six months thereafter."

Proviso as to Naval and Military Officers under certain Rank, and to Officers of the Revenue.

[Sect. 8. "That all persons now in the actual possession of any office, command, place, trust, service, or employment, or in the receipt of any pay, salary, fee, or wages, in respect of or as a qualification for which, by virtue of or under any of the before-mentioned acts or any other act or acts, they respectively ought to have heretofore taken or ought hereafter to receive the said Sacrament of the Lord's Supper, shall be and are hereby confirmed in the possession and enjoyment of their said several offices, commands, places, trusts, services, employments, pay, salaries, fees, and wages respectively, notwithstanding their omission or neglect to take or receive the Sacrament of the Lord's Supper in manner aforesaid, and shall be and are hereby indemnified, freed, and discharged from all incapacities, disabilities, forfeitures, and penalties whatsoever, already incurred or which might hereafter be incurred in consequence of any such omission or neglect; and that no election of or act done or to

Persons now in Possession of any Office which heretofore required the taking of the Sacrament, confirmed in such Possession, and indemnified from Penalties.

9 Geo. 4,
c. 17.

Omissions of
Persons to
make the De-
claration not
to affect
others not
privy thereto.

be done by any such person or under his authority, and not yet avoided, shall be hereafter questioned or avoided by reason of any such omission or neglect, but that every such election and act shall be as good, valid, and effectual as if such person had duly received the said Sacrament of the Lord's Supper in manner aforesaid."

[Sect. 9. "That no act done in the execution of any of the corporate or other offices, places, trusts, or commissions aforesaid, by any such person omitting or neglecting as aforesaid, shall by reason thereof be void or voidable as to the rights of any other person not privy to such omission or neglect, or render such last-mentioned person liable to any action or indictment (e)."]

[By 18 Geo. 3, c. 60; 31 Geo. 3, c. 32, and 43 Geo. 3, c. 30, the restrictions and penalties theretofore imposed on Roman Catholics are removed on their qualifying by declaration, oath, &c. as in those statutes provided; and by 10 Geo. 4, c. 7, all enactments requiring the declaration against transubstantiation, &c. &c. are repealed (f).]

[Clergymen were not obliged to take the oath prescribed by 25 Car. 2, which was applicable only to civil and military, and not to ecclesiastical offices. But they were and are to take the oaths in like manner as civil officers, by the 1 Geo. 1, st. 2, c. 13, which enacteth as follows:

Sect. 2. "Every person who shall be admitted into any office civil or military; or shall receive any pay by reason of any patent or grant from the king; or shall have any command or place of trust in England, or in the navy; or shall have any service or employment in the king's household; all ecclesiastical persons; heads and members of colleges, being of the foundation, or having any exhibition, of eighteen years of age; and all persons teaching pupils; schoolmasters and ushers; preachers and teachers of separate congregations,—shall [within six calendar months after such admission, 9 Geo. 2, c. 26, s. 3,] take and subscribe the oaths of allegiance, supremacy and abjuration, in one of the courts at Westminster, or at the general or quarter sessions." 25 Car. 2, s. 2, "And this to be between the hours of nine and twelve in the forenoon, and no other."

1 Geo. 1, st. 2, c. 13, s. 20. "But this not to extend to churchwardens, nor to any like inferior civil office."

1 Geo. 1, st. 2, c. 13, s. 8. "And every person making default herein, shall be incapable to hold his office; and if he shall execute his office after the time expired, he shall upon conviction be disabled to sue in any action, or to be guardian, or executor, or administrator, or capable of any legacy or deed of gift, or to bear any office, or to vote at any election for members of parliament, and shall forfeit 500*l.* to him who shall sue."

(e) [See title *Dissenters*.]

(f) [See title *Papery*.]

[At the end of each session of parliament an act is generally passed to indemnify, under certain conditions, all persons who have not complied with the requisition of these acts (g).—ED.]

1 Geo. 1, stat. 2, c. 13, s. 14. "And persons forfeiting their office may take a new grant thereof, on their taking the oaths, and conforming; provided it was not filled up before."

1 Geo. 1, st. 2, c. 13, s. 12, 13. "In the universities, where persons shall not take the oaths, or shall not produce a certificate thereof, to be registered in their proper college, and others be not elected in their places within twelve months, the king shall appoint and nominate."

19. The oath of allegiance by the 1 Geo. 1, stat. 2, c. 13, is this:—

"I, A. B. do sincerely promise and swear, that I will be faithful and bear true allegiance to his majesty king George. So help me God."

The oath of supremacy by the same statute:—

"I, A. B., do swear, that I do from my heart abhor, detest, and abjure, as impious and heretical, that damnable doctrine and position, that princes excommunicated or deprived by the pope, or any authority of the see of Rome, may be deposed or murdered by their subjects, or any other whatsoever. And I do declare, that no foreign prince, person, prelate, state, or potentate, hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm. So help me God."

The oath of abjuration by the 6 Geo. 3, c. 53:—

"I, A. B., do truly and sincerely acknowledge, profess, testify and declare in my conscience, before God and the world, that our sovereign lord King George is lawful and rightful king of this realm, and all other his majesty's dominions thereunto belonging. And I do solemnly and sincerely declare, that I do believe in my conscience, that not any of the descendants of the person who pretended to be Prince of Wales during the life of the late King James the Second, and since his decease pretended to be, and took upon himself the style and title of king of England, by the name of James the Third, or of Scotland by the name of James the Eighth, or the style and title of king of Great Britain, hath any right or title whatsoever to the crown of this realm, or any other the dominions thereunto belonging; and I do renounce, refuse, and abjure any allegiance or obedience to any of them. And I do swear, that I will bear faith and true allegiance to his majesty King George, and him will defend, to the utmost of my power, against all traitorous conspiracies and attempts whatsoever, which shall be made against his person, crown, or dignity. And I will do my utmost endeavour to disclose and make known to his majesty and his successors, all treasons and traitorous conspiracies, which I shall know to be against him or any of them. And I do faithfully promise, to the utmost of my power, to support, maintain and defend the succession of

(g) [4 Bl. Com. by Hov. & Ry. 59; and see one of these Indemnity Acts, 1 Will. 4, c. 26.—ED.]

the crown against the descendants of the said James, and against all other persons whatsoever, which succession, by an act intituled 'An Act for the further Limitation of the Crown, and better Securing the Rights and Liberties of the Subject,' is and stands limited to the Princess Sophia, electress and duchess dowager of Hanover, and the heirs of her body, being protestants: and all these things I do plainly and sincerely acknowledge and swear, according to these express words by me spoken, and according to the plain and common sense and understanding of the same words, without any equivocation, mental evasion, or secret reservation whatsoever. And I do make this recognition, acknowledgement, abjuration, renunciation, and promise, heartily, willingly, and truly, upon the true faith of a Christian. So help me God."

Forms of
Quakers'
Affirmations
and Declara-
tions.

20. By the 8 Geo. 1, c. 6, the Quakers' solemn affirmation, instead of an oath, is this:—

"I, A. B. do solemnly, sincerely, and truly declare and affirm."

By the same act, instead of the oaths of allegiance and supremacy, Quakers shall be allowed to make the following declaration of fidelity:—

"I, A. B., do solemnly and sincerely promise and declare that I will be true and faithful to King George, and do solemnly, sincerely, and truly profess, testify, and declare, that I do from my heart abhor, detest, and renounce, as impious and heretical, that wicked doctrine and position, that princes excommunicated or deprived by the pope, or any authority of the see of Rome, may be deposed or murdered by their subjects, or any other whatsoever; and I do declare that no foreign prince, person, prelate, state or potentate, hath or ought to have, any power, jurisdiction, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm."

And by the same act, they were allowed to take the effect of the abjuration oath in these words:—

"I, A. B., do solemnly, sincerely, and truly acknowledge, profess, testify, and declare, that King George is lawful and rightful king of this realm, and of all other his dominions and countries thereunto belonging, and I do solemnly and sincerely declare, that I do believe the person pretended to be the Prince of Wales, during the life of the late King James, and since his decease, pretending to be, and taking upon himself the style and title of king of England by the name of James the Third, or of Scotland by the name of James the Eighth, or the style and title of king of Great Britain, hath not any right or title whatsoever to the crown of this realm, nor any other the dominions thereunto belonging, and I do renounce and refuse any allegiance or obedience to him; and I do solemnly promise that I will be true and faithful, and bear true allegiance to King George, and to him will be faithful against all traitorous conspiracies and attempts whatsoever, which shall be made against his person, crown, or dignity; and I will do my best endeavour to disclose and make known to King George, and his successors, all treasons and traitorous conspiracies, which I shall know to be against him or any of them; and I will be true and faithful to the succession of the crown against him the said James, and all other persons whatsoever, as the same is and stands settled by an act,

intituled 'An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown, to the late Queen Anne, and the heirs of her body, being Protestants,' and as the same by one other act, intituled 'An Act for the further Limitation of the Crown, and better securing the Rights and Liberties of the Subject,' is and stands settled and intailed, after the decease of the said late queen, and for default of issue of the said late queen, to the late Princess Sophia, electress and duchess dowager of Hanover, and the heirs of her body, being protestants; and all these things I do plainly and sincerely acknowledge, promise and declare, according to these express words by me spoken, and according to the plain and common sense and understanding of the same words, without any equivocation, mental evasion or secret reservation whatsoever; and I do make this recognition, acknowledgment, renunciation, and promise, heartily, willingly, and truly."

Since the death of the late Pretender, who assumed the title of King of England by the name of James the Third, it is absurd to renounce the same person being dead; and therefore the aforesaid act of the 6 Geo. 3, c. 53, altered the form of the oath of abjuration, so as to abjure the descendants of the said James. But no provision is made for altering in like manner the Quakers' form of renunciation.

The Quakers' profession of their belief, by the 1 Will. 3, c. 18, is this:—

"I, A. B., profess faith in God the Father, and in Jesus Christ his eternal Son, the true God, and in the Holy Spirit, one God blessed for evermore; and do acknowledge the Holy Scriptures of the Old and New Testament to be given by divine inspiration (h)."

21. The affirmation of the Moravians shall be in these words:—

Of the Moravians.

"I, A. B., do declare, in the presence of Almighty God, the witness of the truth of what I say (i)."

II. In what cases Oaths abolished.

[On the 9th of September, 1835, a statute was passed, intituled "An Act to repeal an Act of the present Session of Parliament, intituled 'An Act for the more effectual Abolition of Oaths and Affirmations taken and made in various Departments of the State, and to substitute Declarations in lieu thereof, and for the more entire Suppression of voluntary and extra-judicial Oaths and Affidavits;' and to make other Provisions for the Abolition of unnecessary Oaths."

Statute for the Abolition of particular Oaths.

["Whereas an act was passed in the present session of parliament, intituled 'An Act for the more effectual Abolition of Oaths and Affirmations taken and made in various Departments of the

5 & 6 W. 4, c. 62.

5 W. 4, c. 8.

(h) [But Quakers (except in the colonies) cannot hold any office or place of profit under government, 22 Geo. 2, c. 46, s. 37, and 13 Geo. 2, c. 7.—ED.]

(i) 22 Geo. 2, c. 30.

5 & 6 Will. 4,
c. 62.

State, and to substitute Declarations in lieu thereof; and for the more entire Suppression of voluntary and extra-judicial Oaths and Affidavits; and it was thereby enacted that the said act should commence and take effect from and after the first day of June in this present year, the year of our Lord one thousand eight hundred and thirty-five, it not being intended that the said recited act should take effect before the same received the royal assent: And whereas the said recited act did not receive the royal assent till after the said first day of June, one thousand eight hundred and thirty-five: And whereas it was enacted by the said recited act, that from and after the first day of June next ensuing it should not be lawful for any justice of the peace to administer or receive such voluntary oaths as are therein mentioned, it being intended that the said prohibition should take effect from the time of the commencement of the said recited act: And whereas it is expedient to amend the said act, and to make some further provisions for the better effecting the object thereof, and to consolidate all the provisions relating thereto into one act: be it therefore enacted, &c. That from and after the passing of this act the said recited act shall be and the same is hereby repealed."

Recited Act
repealed.

Lords of the
Treasury em-
powered to
substitute a
Declaration
in lieu of an
Oath, &c. in
certain Cases.

[Sect. 2. That in case where, by any act or acts made or to be made relating to the revenues of customs or excise, the post office, the office of stamps and taxes, the office of woods and forests, land revenues, works, and buildings, the war office, the army pay office, the office of the treasurer of the navy, the accountant general of the navy, or the ordnance, his majesty's treasury, Chelsea hospital, Greenwich hospital, the board of trade, or any of the offices of his majesty's principal secretaries of state, the India board, the office for auditing the public accounts, the national debt office, or any office under the control, direction, or superintendence of the lords commissioners of his majesty's treasury, or by any official regulation in any department, any oath, solemn affirmation, or affidavit might, but for the passing of this act, be required to be taken or made by any person on the doing of any act, matter, or thing, or for the purpose of verifying any book, entry, or return, or for any other purpose whatsoever, it shall be lawful for the lords commissioners of his majesty's treasury or any three of them, if they shall so think fit, by writing under their hands and seals, to substitute a declaration to the same effect as the oath, solemn affirmation, or affidavit which might but for the passing of this act be required to be taken or made; and the person who might under the act or acts imposing the same be required to take or make such oath, solemn affirmation, or affidavit shall, in presence of the commissioners, collector, or other officer or person empowered by such act or acts to administer such oath, solemn affirmation, or affidavit, make and subscribe such declaration, and every such commissioner, collector, other officer or person is hereby empowered and required to administer the same accordingly."

Declaration
substituted to
be published
in the Gazette,
and after 21
Days from the
Date thereof

[Sect. 3. "That when the said lords commissioners of his majesty's treasury or any three of them shall, in any such case as hereinbefore mentioned, have substituted, in writing under their hands and seals, a declaration in lieu of an oath, solemn affirmation, or affidavit, such lords commissioners shall, so soon as conveniently

may be, cause a copy of the instrument substituting such declaration to be inserted and published in the London Gazette; and from and after the expiration of twenty-one days next following the day of the date of the Gazette wherein the copy of such instrument shall have been published, the provisions of this act shall extend and apply to each and every case specified in such instrument, as well and in the same manner as if the same were specified and named in this act."

5 & 6 Will. 4,
c. 62.

the Provisions
of this Act to
apply ;

[Sect. 4. "That after the expiration of the said twenty-one days it shall not be lawful for any commissioner, collector, officer, or other person to administer or cause to be administered, or receive or cause to be received, any oath, solemn affirmation, or affidavit, in the lieu of which such declaration as aforesaid shall have been directed by the lords commissioners of his majesty's treasury to be substituted."

and no Oath
to be adminis-
tered where
such Declara-
tion has been
directed.

[Sect. 5. "That if any person shall make and subscribe any such declaration as hereinbefore mentioned in lieu of any oath, solemn affirmation, or affidavit by any act or acts relating to the revenues of customs or excise, stamps and taxes, or post office, required to be made on the doing of any act, matter, or thing, or for verifying any book, account, entry, or return, or for any purpose whatsoever, and shall wilfully make therein any false statements as to any material particular, the person making the same shall be deemed guilty of a misdemeanor."

False Decla-
rations in
matters re-
lating to cer-
tain Revenues
a Misdemea-
nor.

[Sect. 6. "That nothing in this act contained shall extend or apply to the oath of allegiance in any case in which the same now is or may be required to be taken by any person who may be appointed to any office, but that such oath of allegiance shall continue to be required, and shall be administered and taken, as well and in the same manner as if this act had not been passed."

Oath of Alle-
giance still to
be required in
all Cases.

[Sect. 7. "That nothing in this act contained shall extend or apply to any oath, solemn affirmation, or affidavit which now is or hereafter may be made or taken, or be required to be made or taken, in any judicial proceeding in any court of justice, or in any proceeding for or by way of summary conviction before any justice or justices of the peace, but all such oaths, affirmations, and affidavits, shall continue to be required, and to be administered, taken, and made, as well and in the same manner as if this act had not been passed."

Oaths in
Courts of
Justice, &c.
still to be
taken.

[Sect. 8. "That it shall be lawful for the universities of Oxford and Cambridge, and for all other bodies corporate and politic, and for all bodies now by law or statute, or by any valid usage, authorized to administer or receive any oath, solemn affirmation, or affidavit, to make statutes, bye-laws, or orders authorizing and directing the substitution of a declaration in lieu of any oath, solemn affirmation, or affidavit now required to be taken or made: Provided always, that such statutes, bye-laws, or orders be otherwise duly made and passed according to the charter, laws, or regulations of the particular university, other body corporate and politic, or other body so authorized as aforesaid."

Universities
of Oxford and
Cambridge,
and other
Bodies, may
substitute a
Declaration
in lieu of an
Oath.

[Sect. 9. "And whereas persons serving the offices of churchwarden and sidesman are at present required to take an oath of office before entering upon the execution thereof, and also an oath

Churchwar-
den's and
Sidesman's
Oath abo-

5 & 6 Will. 4,
c. 62.

lished, and a
Declaration
to be made in
lieu thereof.

Declaration
substituted
for Oaths and
Affidavits by
Persons act-
ing in Turn-
pike Trusts.

Declaration
substituted for
Oaths and
Affidavits
heretofore
required on
taking out a
Patent.

Declaration
substituted for
Oaths and
Affidavits re-
quired by Acts
as to Pawn-
brokers.

Penalties as
to such Oaths,
&c. to apply
to Declara-
tions.

on quitting such office, and it is expedient that a declaration should be substituted for such oath of office, and that the oath on quitting the same shall be abolished; be it enacted, That in future every person entering upon the office of churchwarden or sidesman, before beginning to discharge the duties thereof, shall, in lieu of such oath of office, make and subscribe, in the presence of the ordinary or other person before whom he would, but for the passing of this act, be required to take such oath, a declaration that he will faithfully and diligently perform the duties of his office, and such ordinary or other person is hereby empowered and required to administer the same accordingly: Provided always, that no churchwarden or sidesman shall in future be required to take any oath on quitting office, as has heretofore been practised."

[Sect. 10. "That in any case where, under any act or acts for making, maintaining, or regulating any highway, or any road, or any turnpike road, or for paving, lighting, watching, or improving any city, town, or place, or touching any trust relating thereto, any oath, solemn affirmation, or affidavit might, but for the passing of this act, be required to be taken or made by any person whomsoever, no such oath, solemn affirmation, or affidavit shall in future be required to be or be taken or made, but the person who might under the act or acts imposing the same be required to take or make such oath, solemn affirmation, or affidavit shall, in lieu thereof, in the presence of the trustee, commissioner, or other person before whom he might under such act or acts be required to take or make the same, make and subscribe a declaration to the same effect as such oath, solemn affirmation, or affidavit, and such trustee, commissioner, or other person is hereby empowered and required to administer and receive the same."

[Sect. 11. "That whenever any person or persons shall seek to obtain any patent under the great seal for any discovery or invention, such person or persons shall, in lieu of any oath, affirmation, or affidavit which heretofore has or might be required to be taken or made upon or before obtaining any such patent, make and subscribe, in the presence of the person before whom he might, but for the passing of this act, be required to take or make such oath, affirmation, or affidavit, a declaration to the same effect as such oath, affirmation, or affidavit; and such declaration, when duly made and subscribed, shall be to all intents and purposes as valid and effectual as the oath, affirmation, or affidavit in lieu whereof it shall have been so made and subscribed."

[Sect. 12. "That where by any act or acts at the time in force for regulating the business of pawnbrokers any oath, affirmation, or affidavit might, but for the passing of this act, be required to be taken or made, the person who by or under such act or acts might be required to take or make such oath, affirmation, or affidavit shall in lieu thereof make and subscribe a declaration to the same effect; and such declaration shall be made and subscribed at the same time, and on the same occasion, and in the presence of the same person or persons, as the oath, affirmation, or affidavit in lieu whereof it shall be made and subscribed would by the act or acts directing or requiring the same be directed or required to be taken or made; and all and every the enactments, provisions, and penalties con-

tained in or imposed by any such act or acts, as to any oath, affirmation, or affidavit thereby directed or required to be taken or made, shall extend and apply to any declaration in lieu thereof, as well and in the same manner as if the same were herein expressly enacted with reference thereto.

5 & 6 Will. 4,
c. 62.

[Sect. 13. “ ‘ And whereas a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in anywise pending or at issue before the justice of the peace or other person by whom such oaths or affidavits have been administered or received: And whereas doubts have arisen whether or not such proceeding is illegal;’ for the more effectual suppression of such practice and removing such doubts, be it enacted, That from and after the commencement of this act it shall not be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being: Provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the houses of parliament or any committee thereof respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively.

Justices not
to administer
Oaths, &c.
touching Mat-
ters whereof
they have no
Jurisdiction
by Statute.

Proviso.

[Sect. 14. “ That in any case in which it has been the usual practice of the Bank of England to receive affidavits on oath to prove the death of any proprietor of any stocks or funds transferable there, or to identify the person of any such proprietor, or to remove any other impediment to the transfer of any such stocks or funds, or relating to the loss, mutilation, or defacement of any bank note or bank post bill, no such oath or affidavit shall in future be required to be taken or made, but in lieu thereof the person who might have been required to take or make such oath or affidavit shall make and subscribe a declaration to the same effect as such oath or affidavit.

Declaration
substituted
for Oaths and
Affidavits re-
quired by
Bank of Eng-
land on the
Transfer of
Stock.

[Sect. 15. “ ‘ And whereas an act was passed in the fifth year of the reign of his late majesty King George the Second, intituled ‘ An Act for the more easy Recovery of Debts in His Majesty’s Plantations and Colonies in America:’ And whereas another act was passed in the fifty-fourth year of the reign of his late majesty King George the Third, intituled ‘ An Act for the more easy Recovery of Debts in his Majesty’s Colony of New South Wales:’ And whereas it is expedient that in future a declaration should be substituted in lieu of the affidavit on oath authorized and required by the said recited acts;’ be it therefore enacted, That from and after the commencement of this act, in any action or suit then depending or thereafter to be brought or intended to be brought in any court of law or equity within any of the territories, plantations, colonies, or dependencies abroad, being within and part of his majesty’s dominions,

Declaration
substituted
for Oaths and
Affidavits re-
quired by 5
Geo. 2, c. 7,
and 54 Geo. 3,
c. 15.

5 & 6 Will. 4,
c. 62.

for or relating to any debt or account wherein any person residing in Great Britain and Ireland shall be a party, or for or relating to any lands, tenements, or hereditaments or other property situate, lying, and being in the said places respectively, it shall and may be lawful to and for the plaintiff or defendant, and also to and for any witness to be examined or made use of in such action or suit, to verify or prove any matter or thing relating thereto by solemn declaration or declarations in writing in the form in the schedule hereunto annexed, made before any justice of the peace, notary public, or other officer now by law authorized to administer an oath, and certified and transmitted under the signature and seal of any such justice, notary public duly admitted and practising, or other officer, which declaration, and every declaration relative to such matter or thing as aforesaid, in any foreign kingdom or state, or to the voyage of any ship or vessel, every such justice of the peace, notary public, or other officer shall be and he is hereby authorized and empowered to administer or receive; and every declaration so made, certified, and transmitted shall in all such actions and suits be allowed to be of the same force and effect as if the person or persons making the same had appeared and sworn or affirmed the matters contained in such declaration *viva voce* in open court, or upon a commission issued for the examination of witnesses or of any party in such action or suit respectively; provided that in every such declaration there shall be expressed the addition of the party making such declaration, and the particular place of his or her abode.

Declaration
in Writing
sufficient to
prove execu-
tion of any
Will, Codicil,
&c.

[Sect. 16. "That it shall and may be lawful to and for any attesting witness to the execution of any will or codicil, deed or instrument in writing, and to and for any other competent person, to verify and prove the signing, sealing, publication, or delivery of any such will, codicil, deed, or instrument in writing, by such declaration in writing made as aforesaid, and every such justice, notary, or other officer shall be and is hereby authorized and empowered to administer or receive such declaration.

Suits on be-
half of His
Majesty to be
proved by
Declaration.

[Sect. 17. "That in all suits now depending or hereafter to be brought in any court of law or equity by or in behalf of his majesty, his heirs and successors, in any of his said majesty's territories, plantations, colonies, possessions, or dependencies, for or relating to any debt or account, that his majesty, his heirs and successors, shall and may prove his and their debts and accounts and examine his or their witness or witnesses by declaration, in like manner as any subject or subjects is or are empowered or may do by this present act.

Voluntary
Declaration
in the Form
in the Sched-
ule may be
taken.

[Sect. 18. "And whereas it may be necessary and proper in many cases not herein specified to require confirmation of written instruments or allegations, or proof of debts, or of the execution of deeds or other matters; be it therefore further enacted, That it shall and may be lawful for any justice of the peace, notary public, or other officer now by law authorized to administer an oath, to take and receive the declaration of any person voluntarily making the same before him in the form in the schedule to this act annexed; and if any declaration so made shall be false or untrue in any material particular, the person wilfully making such false declaration shall be deemed guilty of a misdemeanor.

[Sect. 19. "That whenever any declaration shall be made and subscribed by any person or persons under or in pursuance of the provisions of this act, or any of them, all and every such fees or fee as would have been due and payable on the taking or making any legal oath, solemn affirmation, or affidavit shall be in like manner due and payable upon making and subscribing such declaration.

5 & 6 Will. 4,
c. 62.

Fees on Oaths
payable on
Declarations
substituted in
lieu thereof.

[Sect. 20. "That in all cases where a declaration in lieu of an oath shall have been substituted by this act, or by virtue of any power or authority hereby given, or where a declaration is directed or authorized to be made and subscribed under the authority of this act, or of any power hereby given, although the same be not substituted in lieu of an oath heretofore legally taken, such declaration, unless otherwise directed under the powers hereby given, shall be in the form prescribed in the schedule hereunto annexed.

Declarations
to be in the
Form pre-
scribed by
Schedule.

[Sect. 21. "That in any case where a declaration is substituted for an oath under the authority of this act, or by virtue of any power or authority hereby given, or is directed and authorized to be made and subscribed under the authority of this act, or by virtue of any power hereby given, any person who shall wilfully and corruptly make and subscribe any such declaration, knowing the same to be untrue in any material particular, shall be deemed guilty of a misdemeanor.

Persons mak-
ing false
Declaration
deemed guilty
of a Misde-
meanor.

[Sect. 22. "That this act shall commence and take effect from and after the first day of October in this present year, the year of our Lord one thousand eight hundred and thirty-five.

Commence-
ment of Act.

["SCHEDULE referred to by the foregoing act.

["*I, A. B., do solemnly and sincerely declare, that — and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of an act made and passed in the — year of the reign of his present majesty, intituled 'An Act,' [here insert the title of this act(e)].*"

Obit.

AN *obit* was an office performed at funerals, when the corpse was in the church, and before it was buried; which afterwards came to be anniversary, and then money or lands were given towards the maintenance of a priest who should perform this office every year (*f*).

(e) [For the oaths of jurors, see Stephen on Criminal Law, p. 303; of witnesses, *ibid.* 304; of members of parliament, *ibid.* 15, 18; and as to the unlawful administering and taking them, *ibid.* 56. For the oath against

simony, see that title; and generally on the subject of oaths, Dr. Paley's Chapter on Oaths, Moral and Political Philosophy.—ED.]

(f) Nels. tit. Obit; Ayl. Par. 395.

Oblations—See **Offerings**.

Obventions—See **Offerings**.

Offerings (*g*).

OFFERINGS, *oblations*, and *obventions*, are one and the same thing: though *obvention* is the largest word. And under these are comprehended, not only those small customary sums commonly paid by every person when he receives the sacrament of the Lord's Supper at Easter, which in many places is by custom twopence from every communicant, and in London fourpence a house, but also the customary payment for marriages, christenings, churchings, and burials (*h*).

The term *oblation*, in the canon law, means whatever is in any manner offered to the church by the pious and faithful, whether it be moveable or immoveable property (*i*). These offerings were given on various occasions, such as at burials and marriages, by penitents, at festivals, or by will. But they were not to be received from persons excommunicated, or who had disinherited their sons, or been guilty of injustice, or had oppressed the poor. Such offerings constituted at first the chief revenues of the church. When established by custom, they may now be recovered as small tithes before two justices of the peace, by the 7 & 8 Will. 3, c. 6, and subsequent acts (*k*). Offerings are made at the holy altar by the king and queen twelve times in the year on festivals called *offering days*, and distributed by the dean of the chapel to the poor. James the First commonly offered a piece of gold, having the following mottos: *Quid retribuam domino pro omnibus quæ tribuit mihi? Cor contritum et humiliatum non despiciet Deus* (*l*). The money in lieu of these accustomed offerings is now fixed at fifty guineas a year, and paid by the privy purse annually to the dean or his order; for the distribution of which offertory money, the dean directs proper lists of poor people to be made out (*m*).

Concerning which, it is enacted by the statute of the 2 & 3 Edw. 6, c. 13, "that all persons which by the laws or customs of this realm ought to make or pay their offerings, shall yearly well and truly content and pay the same to the parson, vicar, proprietor, or their deputies or farmers, of the parishes where they shall dwell or abide; and that, at such four offering days,

(*g*) [See **Adibowson**, vol. i.; Co-myn's Digest, tit. Prohibition, G. 11; and Ayliffe's Parergon, 11.—Ed.]

(*h*) Wats. c. 52.

(*i*) X. 5, 40, 29; Spelm. in Concil. vol. i. p. 39.

(*k*) See **Tithes**, VII. 9.

(*l*) Lex Constit. 184.

(*m*) Ex. MSS.

as at any time heretofore within the space of four years last past hath been used and accustomed for the payment of the same; and in default thereof, to pay for the said offerings at Easter then next following."

The four offering days are Christmas, Easter, Whitsuntide, and the feast of the dedication of the parish church (*n*). Four Offering Days.

Concerning the offerings at Easter, it is directed by the rubric at the end of the communion office, that "yearly at Easter, every parishioner shall reckon with the parson, vicar, or curate, or his or their deputy or deputies, and pay to them or him all ecclesiastical duties, accustomedly due, then and at that time to be paid." By Rubric.

And it hath been decreed, that Easter offerings are due of common right, and not by custom only (*o*); B. Gilbert said, that offerings were a compensation for personal tithes (*p*). Of common Right.

Offerings are due by the common law at the rate of twopence per head (*q*). And the same point was again determined in *Carthew v. Edwards*, Trin., 1749, in the Exchequer; but by custom it may be more. In London, it is mentioned in several books of authority, that a groat a house is due (*r*); but I have not discovered on what this opinion of a groat a house for offerings in London is founded. Hobart refers to the statute, but does not mention any statute in particular. Now, by the stat. 37 Hen. 8, c. 12, s. 12, every householder in London paying 10s. rent or above, shall be discharged of offerings; but his wife and children, or others, taking the rites of the church, at Easter should pay twopence each for their offerings yearly. And London is excepted out of the 27 Hen. 8, c. 20, by s. 2, and out of 2 & 3 Edw. 6, c. 13, by s. 12, and out of 7 & 8 Will. 3, c. 6, by s. 5. To suits in Ecclesiastical Courts for tithes in London, a prohibition is grantable (*s*). So where there is a suit in the Ecclesiastical Court for a modus, if the modus be denied, and the court proceeds, a prohibition shall be granted (*t*). For the Ecclesiastical Court cannot try a custom or a prescription: and the reason applies to offerings when claimed by custom or prescription (*u*).

So in the case of *Carthew v. Edwards*, T., 1749, it was decreed by the Court of Exchequer, that Easter offerings were due to the plaintiff of common right, after the rate of twopence a head for every person in the defendant's family of sixteen years of age and upwards, to be paid by the defendant.

Besides the oblations on the four principal festivals, there were occasional oblations upon particular services: of which there were some free and voluntary, which the parishioners or Four principal Festivals.

(*n*) Gibs. 739.

(*o*) *Laurence v. Jones*, Bunb. 173.

(*p*) *Egerton v. Still*, ibid. 198.

(*q*) Bunb. 173, pl. 425.

(*r*) Hob. 11; Godolph. Repert.

Canon. edit. 1687, p. 427; Wats. 585.

(*s*) Hob. 11; 2 Inst. 659.

(*t*) Palm. 440; *Steward's case*,

Latch. 210; Noy, 81, S. C.

(*u*) Serjt. Hill's MS. notes.

others were not bound to perform but *ad libitum*; there were others by custom certain and obligatory, as those for marriages, christenings, churching of women, and burials (*x*).

Those offerings which were free and voluntary are now vanished, and are not comprehended within the aforesaid statute; but those that were customary and certain, as for communicants, marriages, christenings, churching of women, and burials, are confirmed to the parish priests, vicars, and curates of the parishes where the parties live that ought to pay the same (*y*).

Particularly, at the burial of the dead, it was a custom for the surviving friends to offer liberally at the altar for the use of the priest, and the good estate of the soul of the deceased (*z*).

And from hence the custom still continueth in many places of bestowing alms to the poor on the like occasions.

These oblations were anciently due to the parson of the parish that officiated at the mother church or chapel that had parochial rates; but if they were paid to other chapels that had not any parochial rates, the chaplains thereof were accountable for the same to the parson of the mother church (*a*).

By the statute of *Circumspectè agatis*, 13 Edw. 1, "If a parson demands of his parishioners oblations due and accustomed, such demand shall be made in the Spiritual Court; in which case the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."

But Sir Simon Degge conceiveth, that an action also may be formed upon the statute at the common law (*b*).

[These offerings are especially exempted from the operation of the Tithe Commutation Acts (see title *Tithe*), and may be recovered with other oblations and obventions before the justices of the peace, under the Small Tithe Acts. By 4 & 5 Vict. c. 36 (*c*), it is enacted,

["That from and after the passing of this act all the enactments of 5 & 6 Will. 4, respecting proceedings in any of her majesty's courts in England, in respect of tithes, oblations, and compositions of or under the yearly value of ten pounds, and of any great or small tithes, moduses, compositions, rates, or other ecclesiastical dues or demands whatsoever, of or under the value of fifty pounds, withheld by any Quaker, shall extend and be applied to all the ecclesiastical courts in England."]

Enactments and Provisions of recited Act respecting Proceedings for the Recovery of certain Tithes and other Ecclesiastical Dues extended to all Ecclesiastical Courts in England.

Official—See titles **Chancellor** and **Archdeacon**.

(*x*) Deg. p. 2, c. 23; [*Burdeaux v. Lancaster*, 1 Salk. 332; *Dean and Ch. of Exeter's case*, ib. 334.—ED.]

(*y*) Ibid.

(*z*) Ken. Par. Ant. Gloss.

(*a*) Cod. 427.

(*b*) Deg. p. 2, c. 23. [See also the cases of *Fruin v. Dean and Chapter of York*, 2 Keb. 778; and *Andrews*

v. Symson, 3 Keb. 523.—ED.]

(*c*) ["An Act to amend an Act of the Fifth and Sixth Years of King William the Fourth, 'for the more easy Recovery of Tithes;' and to take away the Jurisdiction from the Ecclesiastical Courts in all Matters relating to Tithes of a certain Amount." —ED.]

Old Style—See **Kalendar**.

Option—See **Bishops**.

Oratory—See **Chapel**.

Ordinal.

ORDINAL, *ordinale*, was that book which *ordered* the manner of performing divine service: and seemeth to be the same which was called the *pie* or *portuis*, and sometimes *portiforium* (c).

Ordinary.

ORDINARY, *ordinarius* (which is a word we have received from the civil law), is he who hath the proper and regular jurisdiction, as of course and of common right; in opposition to persons who are *extraordinarily* appointed (d).

In some acts of parliament we find the bishop to be called ordinary, and so he is taken at the common law, as having ordinary jurisdiction in causes ecclesiastical; albeit in a more general acceptation, the word *ordinary* signifieth any judge authorized to take cognizance of causes in his own proper right, as he is a magistrate, and not by way of deputation or delegation (e).

Ordination.

1. Of the Order of Priests and Deacons in the Church [and Effect of Ordination . . . 39	6. Form and Manner of ordaining Deacons 53
2. Of the Form of ordaining Priests and Deacons, annexed to the Book of Common Prayer 42	7. Form and Manner of ordaining Priests 55
3. Of the Time and Place for Ordination 43	8. Fees for Ordination 56
4. Of the Qualification and Examination of Persons to be ordained 44	9. Simoniackal Promotion to Orders 57
5. Of Oaths and Subscriptions previous to the Ordination . . 53	10. General Office of Deacons . . 58
	11. General Office of Priests . . 61
	12. Exhibiting Letters of Orders . 61
	13. Archbishop Wake's Directions to the Bishops of his Province, in Relation to Orders 62

I. Of the Order of Priests and Deacons in the Church.

1. **THE** word *priest* is nearly the same in all Christian lan-

(c) Lind. 251.

(d) Swinb. 380.

(e) God. 23.

Origin of the Words Priest and Deacon.

guages: the Saxon is *preost*; the German, *preister*; the Belgic, *priester*; the Swedish, *prest*; the Gallic, *prestre*; the Italian, *prete*; the Spanish, *preste*; all evidently enough taken from the Greek *πρεσβυτερος* (*f*).

In like manner, the word *deacon*, with little variation, runneth through all the same languages; deduced from the Greek *διακονος* (*g*).

Orders not a
Sacrament.

2. Art. 35. "Orders are not to be accounted for a sacrament of the Gospel; as not having the like nature of sacraments with baptism and the Lord's Supper; for that they have not any visible sign or ceremony ordained of God."

Antiquity of
Priests and
Deacons in
the Church.

3. "It is evident unto all men diligently reading the Holy Scripture and ancient authors, that from the apostles' time there have been these orders of ministers in Christ's Church; bishops, priests and deacons. Which officers were evermore had in such reverend estimation, that no man might presume to execute any of them, except he were first called, tried and examined, and known to have such qualities as are requisite for the same; and also by public prayer, with imposition of hands, were approved and admitted thereunto by lawful authority (*h*)."

Bishops, Priests, and Deacons.]—Besides these, the Church of Rome hath five others: viz., *subdeacons*, *acolyths*, *exorcist*, *readers*, and *ostiaries*. 1. The *subdeacon*, is he who delivereth the vessels to the deacon, and assisteth him in the administration of the sacrament of the Lord's Supper. 2. The *acolyth*, is he who bears the lighted candle whilst the Gospel is in reading, or whilst the priest consecrateth the host. 3. The *exorcist*, is he who abjureth evil spirits in the name of Almighty God to go out of persons troubled therewith. 4. The *reader*, is he who readeth in the Church of God, being also ordained to this, that he may preach the word of God to the people. 5. The *ostiary*, is he who keepeth the doors of the church, and tolleth the bell. These, though some of them ancient, were human institutions, and such as come not under the limitation which immediately precedes, [*from the apostles' time*]; for which reason, and because they were evidently instituted for convenience only, and were not immediately concerned in the sacred offices of the Church, they were laid aside by our first reformers (*i*).

That no Man might presume to execute any of them.]—And to this purpose, the rule laid down in the canon law is, that if any person, not being ordained, shall baptize, or exercise any divine office, he shall for his rashness be cast out of the church, and never be ordained (*k*).

Except he were first called.]—Accordingly in the several offices, the person to be admitted is first examined by the

(*f*) Jun. Etym.

(*g*) Id.

(*h*) Preface to the Forms of Con-

secration and Ordination.

(*i*) Gibs. 99.

(*k*) Gibs. 138.

archbishop or bishop, whether he thinks or is persuaded that he is truly called thereunto, according to the will of Christ, and the due order of this realm.

Tried, examined, and known.—By the office of ordination, when the archdeacon or his deputy presenteth unto the bishop the persons to be ordained, the bishop says, “Take heed that the persons whom you present unto us, be apt and meet for their learning and godly conversation, to exercise their ministry duly to the honour of God and the edifying of his Church.” To which he answereth, “I have inquired of them, and also examined them, and think them so to be.”

Imposition of Hands.—This was always a distinction between the three superior, and the five forementioned inferior orders; that the first were given by imposition of hands, and the second were not (*l*).

[Hear the learned Wheatley (*m*) on this subject:—“And to what has been said, we might for farther proof add the joint testimony of all Christians for near fifteen hundred years together; and challenge our adversaries to produce one instance of a valid ordination by presbyters in all that time. It seems therefore very strange that if presbyters ever had the power of ordination, that they should tamely give up their right, without any complaint, or so much as having any thing upon record to witness their original authority to after ages. In short, we have as much reason to believe that the power of ordination is appropriated to those we now call bishops, as we have to believe the necessary continuance of any one positive ordinance in the Gospel.” “And now (to sum up all that has been said in a few words) a commission to ordain was given to none but the apostles and their successors; and to extend it to any inferior order is without warrant in Scripture or antiquity. For every commission is naturally exclusive of all persons except those to whom it was given. So that since it does not appear that the commission to ordain, which the apostles received from our Saviour, was ever granted to any but such as must be acknowledged to be a superior order to that of presbyters, which superior order is the same with that of those we now call bishops, therefore it follows that no others have any pretence thereunto; and consequently none but such as are ordained by bishops can have any title to minister in the Christian Church.”

[In a case where it was supposed that ordination had been illegally conferred upon a candidate who had not attained the age of twenty-four, Sir W. Scott (Lord Stowell) was consulted as to whether evidence of this fact would be admitted in order to show that an act done by him as priest was null and void?

Effect of Ordination once conferred.

(*l*) Gibs. 99.

(*m*) [Wheatley on the Book of Common Prayer, chap. 2, sect. 3.]

Opinion.

[“ It appears to me that the ordination would be conclusive as to all legal qualifications of the party, and that evidence could not be received to show that it had been illegally conferred and was invalid.

“ Nov. 1794.

WM. SCOTT.”

[And it is laid down in Rolle that after induction a man cannot be deprived for any fault in his institution (*n*).—ED.]

II. *Of the Form of ordaining Priests and Deacons, annexed to the Book of Common Prayer.*

Form established in the 2 Edw. 6.

1. In the liturgy established in the second year of King Edward VI., there was also a form of consecrating and ordaining of bishops, priests and deacons; not much differing from the present form.

All other Forms abolished.

2. Afterwards, by the 3 & 4 Edw. 6, c. 10, s. 1, it was enacted, that “ all books heretofore used for service of the church, other than such as shall be set forth by the king’s majesty, shall be clearly abolished.”

Form annexed to the Book of Common Prayer.

3. And by the 5 & 6 Edw. 6, c. 1, it is thus enacted: “ The king, with the assent of the lords and commons in parliament, hath annexed the Book of Common Prayer to this present statute; adding also a form and manner of making and consecrating of archbishops, bishops, priests, and deacons, to be of like force and authority as the Book of Common Prayer (*o*).”

Established by the Thirty-nine Articles.

4. And by Art. 36, “ The Book of Consecration of Archbishops and Bishops, and ordering of Priests and Deacons, lately set forth in the time of Edward VI., and confirmed at the same time by authority of parliament, doth contain all things necessary to such consecration and ordering; neither hath it any thing, that of itself is superstitious and ungodly. And therefore, whosoever are consecrated or ordered according to the rites of that book, since the second year of the forenamed King Edward unto this time, or hereafter shall be consecrated or ordered according to the same rites; we declare all such to be rightly, orderly, and lawfully consecrated and ordered.”

By Canon.

5. And by Can. 8, “ Whosoever shall affirm or teach, that the form and manner of making and consecrating bishops, priests and deacons, containeth any thing that is repugnant to the word of God; or that they who are made bishops, priests or deacons, in that form, are not lawfully made, nor ought to be accounted either by themselves or others to be truly either bishops, priests, or deacons, until they have some other calling to

(*n*) [2 Rolle, 282, 345.]

(*o*) 5 & 6 Edw. 6, c. 1, s. 5; 8 Eliz. c. 1.

those divine offices; let him be excommunicated *ipso facto*, not to be restored, until he repent, and publicly revoke such his wicked errors."

6. And by the Act of Uniformity of the 13 & 14 Car. 2, c. 4, s. 2, it is enacted as followeth: "All ministers in every place of public worship shall be bound to use the morning and evening prayer, administration of the sacraments, and all other the public and common prayer, in such order and form as is mentioned in the book annexed to this present act, and intituled, 'The Book of Common Prayer and administration of the Sacraments, and other Rites and Ceremonies of the Church of England, together with the Psalter or Psalms of David, pointed as they are to be sung or said in Churches; and the Form or Manner of making, ordaining, and consecrating of Bishops, Priests, and Deacons.'"

By Act of
Parliament.

Sect. 30, 31. "And all subscriptions to be made to the Thirty-nine Articles shall be construed to extend (touching the said thirty-sixth article above recited) to the book containing the form and manner of making, ordaining and consecrating of bishops, priests, and deacons in this act mentioned, as the same did heretofore extend unto the book set forth in the time of King Edward VI.

III. *Of the Time and Place for Ordination.*

1. By Can. 31, "Forasmuch as the ancient fathers of the church, led by example of the apostles, appointed prayers and fasts to be used at the solemn ordering of ministers; and to that purpose allotted certain times, in which only sacred orders might be given or conferred: we, following their holy and religious example, do constitute and decree, that no deacons or *ministers* be made and ordained, but only upon Sundays immediately following *jejunia quatuor temporum*, commonly called ember weeks, appointed in ancient time for prayer and fasting, (purposely for this cause at the first institution,) and so continued at this day in the Church of England."

Time.

And by the preface to the forms of consecration and ordination it is prescribed, that the bishop may at the times appointed in the canon, or else upon urgent occasion on some other Sunday or holiday in the face of the church, admit deacons and priests.

But this might not be done, at other times than is directed by the canon, at the sole discretion of the bishop, but he was to have the archbishop's dispensation or licence, as the practice was: and this was understood to be a special prerogative of the see of Rome in the times of popery. But as the rubric made in the time of King Edward the Sixth, and continued in the last revisal of the Common Prayer, seems to leave it to the judgment of the bishop, without any direction to have recourse

to the archbishop, it may be a question whether such dispensation be now necessary (*p*).

Place.

2. And this to be done in the cathedral, or parish church where the bishop resideth (*q*).

So that the bishop's jurisdiction as to conferring of orders is not confined to one certain place, but he may ordain at the parish church where he shall reside; and the Irish bishops do sometimes ordain in England; but, regularly, leave ought to be obtained of the bishop within whose diocese the ordination is performed (*r*).

And this is agreeable to the rule of the ancient canon law; which directeth, that a bishop shall not ordain within the diocese of another, without the licence of such other bishop (*s*).

IV. *Of the Qualification and Examination of Persons to be ordained* (*t*).

Age.

1. By Can. 34, "No bishop shall admit any person into sacred orders except he, desiring to be a *deacon*, is three and twenty years old, and to be a *priest* four and twenty years complete."

And by the preface to the form of ordination: "None shall be admitted a deacon except he be twenty-three years of age, *unless he have a faculty*, and every man which is to be admitted a priest shall be full four and twenty years old."

Unless he have a Faculty.—So that a faculty or dispensation is allowed, for persons of extraordinary abilities to be admitted deacons sooner (*u*).

Which faculty (as it seemeth) must be obtained from the Archbishop of Canterbury.

And by the statute of the 13 Eliz. c. 12, "*None shall be made minister, being under the age of four and twenty years.*"

And in this case there is no dispensation (*v*).

Note, here it may be proper to observe once for all, the equivocal signification of the word *minister*, both in our statutes, canons, and rubric in the Book of Common Prayer. Oftentimes it is made to express the person officiating in general, whether priest or deacon; at other times it denoteth the priest alone, as contra-distinguished from the deacon, as particularly here in this statute, and in Can. 31 aforegoing. And in such cases, the determination thereof can only be ascertained from the connexion and circumstances.

E., 1 Jac. 2, *Roberts v. Pain* (*x*). A person being presented to the parish church of Christ Church in Bristol, was libelled against, because he was not twenty-three years of age when

(*p*) Gibs. 139.

(*q*) Can. 31.

(*r*) Johns. 34.

(*s*) Gibs. 139; 6*, 3, 4, 37.

(*t*) [See title *Benefice*, sections 2 and 3, *Examination and Refusal*, vol.

i., for the law on this important subject.—ED.]

(*u*) Gibs. 145.

(*v*) Gibs. 146.

(*x*) 3 Mod. 67.

made deacon, nor twenty-four when made priest. A prohibition was prayed upon this suggestion, that if the matter was true a temporal loss, to wit, deprivation would follow; and that therefore it was triable in the temporal court: But it was denied, because so it is also in the case of drunkenness and other vices, which are usually punished in the ecclesiastical courts, though temporal loss may ensue.

By the 44 Geo 3, c. 43, s. 1, it is enacted, "that no person shall be admitted a deacon before he shall have attained the age of three and twenty years complete, and that no person shall be admitted a priest before he shall have attained the age of four and twenty years complete: and in case any person shall, from and after the passing of this act, be admitted a deacon before he shall have attained the age of three and twenty years complete, or be admitted a priest before he shall have attained the age of four and twenty years complete, that then and in every such case the admission of every such person as deacon or priest respectively shall be merely void in law, as if such admission had not been made, and the person so admitted shall be wholly incapable of having, holding or enjoying, or being admitted to any parsonage, vicarage, benefice, or other ecclesiastical promotion or dignity whatsoever, in virtue of such his admission as deacon or priest respectively, or of any qualification derived or supposed to be derived therefrom: Provided always that no title to confer or present by lapse shall accrue by any avoidance or deprivation, *ipso facto*, by virtue of this statute, but after six months' notice of such avoidance or deprivation given by the ordinary to the patron."

But nothing herein contained shall extend, or be construed to extend, to take away any right of granting faculties heretofore lawfully exercised, and which now be lawfully exercised by the Archbishop of Canterbury.

2. "Seeing it is dangerous to ordain any without a certain and true title; we do establish that before the conferring of orders by the bishop a diligent search and inquiry be made thereof (y)." Title.

Can. 33. "It hath been long since provided by many decrees of the ancient fathers, that none should be admitted either deacon or priest, who had not first some certain place where he might use his function: According to which examples we do ordain, that henceforth no person shall be admitted into sacred orders, except (1) he shall at that time exhibit to the bishop, of whom he desireth imposition of hands, a presentation of himself to some ecclesiastical preferment then void in the diocese; or (2) shall bring to the said bishop a true and undoubted certificate, that either he is provided of some church within the said diocese where he may attend the cure of souls, or (3) some minister's place vacant either in the cathedral church of that

(y) Otho, Ath. 16.

diocese, or in some other collegiate church therein also situate, where he may execute his ministry; or (4) that he is a fellow, or in right as a fellow, or (5) to be a conduct or chaplain in some college in Cambridge or Oxford; or (6) except he be a master of arts of five years' standing, that liveth of his own charge in either of the universities; or (7) except by the bishop himself that doth ordain him minister, he be shortly after to be admitted either to some benefice or curateship then void. And if any bishop shall admit any person into the ministry that hath none of these titles as is aforesaid, then he shall keep and maintain him with all things necessary, till he do prefer him to some ecclesiastical living: And if the said bishop shall refuse so to do, he shall be suspended by the archbishop, being assisted with another bishop, from giving of orders by the space of a year (z)."

No Person, &c.]—By this branch of the canon, which is negative and exclusive, one sort of title that was heretofore very common, is in great measure taken away, viz. the title of his *patrimony*, which we meet with very frequently among the acts of ordination in our ecclesiastical records; and not only so, but the title of a *pension* or allowance in money which is frequently specified; and sometimes the title of a *particular person* (of known abilities and there named) without any such specification of an annual sum. And at such titles, after the estate, sum or the like, is often added in the acts of ordination (especially when it was small) that the party therewith acknowledged himself content, which declaration so made and entered, was understood to be a discharge of the bishop ordaining, from any obligation to provide for him (a).

In the Cathedral Church.]—This is only an affirmance of what was the law of the church before; the title of vicar *choral* being frequently entered as a canonical title in the acts of ordination (b).

Or that he is a Fellow.]—This also, as to fellows of colleges, appears to have been all along the law of the Church of England, by the frequent entries of that title, as received and admitted in the acts of ordination (c).

Chaplain in some College.]—This seems to be a title founded on this canon, from the silence of the ancient books relating thereunto (d).

Master of Arts of Five Years' standing.]—This also seems to be a new title established by the canon (e).

Shall keep and maintain him.]—This was enjoined by a canon of the third Council of Lateran (f); which canon was

(z) [Godolph. 13.]

(a) Gibs. 140.

(b) Ibid.

(c) Ibid.

(d) Ibid.

(e) Ibid.

(f) [The third Council of Lateran was held 1179, and enjoined by its fifth section as follows: 5. Ne aliquis ordinetur sine certo titulo; episcopus

taken into the body of laws made in a council held at London, in the year 1200. And in the time of Archbishop Winchelsey there is in the register an order from the archbishop to one of his comprovincial bishops, to provide one of a benefice whom he had ordained without title; and a citation of the executors of a bishop deceased, to oblige them to provide for one, whom the bishop had so ordained; and there is an order to a bishop, to oblige a clergyman, who had given a title of a certain annual sum, to pay it till the clerk should be provided for; and a citation to Merton College, to show cause why they should not be obliged to maintain one, to whom they had given a title at his ordination. In like manner, the observation of this canon made in the year 1603 (or rather of the common law of the church, of which this canon is only an affirmance), was specially enforced upon the bishops by King Charles the First and Archbishop Laud, upon this pain or penalty of maintaining the person, if they should ordain any without such title. And in ancient times, the names of the persons who granted the titles were entered in the acts of ordination, as standing engaged; as a testimony against the person entitling, in case the clerk (ordained upon such title) should at any time want convenient maintenance (*g*).

And whereas the laws of the church in this particular might be eluded, by a promise on the part of the person ordained, not to insist upon such maintenance; we find that case considered in the ancient Gloss, and there it seems to be determined, that the same being a public right cannot be released. And before that, it had been made part of the body of the canon law, that persons having made such promise, unless compassionately dispensed withal, ought not to be admitted to a higher order, nor to minister in the order already taken (*h*.)

In case of *letters dismissory*, the rule of the canon law is, that the bishop whose business it was to see that there was a good title, shall be liable to the penalty for a person ordained without sufficient title, although another bishop ordained such person (*i*).

3. By a constitution of Otho, it is thus enjoined: "Seeing it is dangerous to ordain persons unworthy, void of understanding, illegitimate, irregular, and illiterate; we do decree, that before the conferring of orders by the bishop, strict search and inquiry be made of all these things (*k*)."

Testimonial,

And by a constitution of Archbishop Reynolds, no simoniac, si aliquem sine certo titulo de quo necessaria vitæ percipiat, in diaconum vel presbyterum ordinaverit, tamdiu necessaria ei subministret, donec in aliquâ ei ecclesiâ convenientia stipendia militia clericalis assignet, nisi forte talis qui ordinatur extiterit qui de suâ vel paternâ hereditate subsidium vitæ possit habere." See vol. x. of the folio edit. of the Councils, printed at Paris 1671.—Ed.]

(*g*) Gibs. 141.

(*h*) Ibid.

(*i*) Ibid.

(*k*) Athon, 16.

homicide, person excommunicate, usurer, sacrilegious person, incendiary, or falsifier, nor any other having *canonical impediment*, shall be admitted into holy orders (*l*).

Canonical Impediment.]—As suppose, of *bigamy*; or any other which proceeds rather from defect than crime (*m*).

And by several constitutions of Edmund, archbishop, the following impediments and offences are declared to be causes of suspension from orders received, and consequently so far forth are objections likewise, if known beforehand, against being ordained at all; viz.

They who are born of not lawful matrimony, and have been ordained without dispensation; shall be suspended from the execution of their office, till they obtain a dispensation:

They who have taken holy orders, in the conscience of any mortal sin, or for temporal gain only; shall not execute their office, till they shall have been expiated from the like sin by the sacrament of penance.

Again; all who appear to have contracted *irregularity* in the taking of orders, or before or after, unless dispensed withal by those who have power to dispense with the same; shall be suspended from the execution of their office, until they shall have lawful dispensations: By *irregulars* as to the premisses, we understand homicides, advocates in causes of blood, simonists, makers of simoniacal contracts; and who, being infected with the contagion, have knowingly taken orders from heretics, schismatics, or persons excommunicated by name.

Also bigamists, husbands of lewd women, violators of virgins consecrated to God, persons excommunicate, and persons having taken orders surreptitiously, sorcerers, burners of churches, and if there be any other of the like kind.

And he who did examine the parties, was to inquire into all these particulars (*n*).

But this is not now required; but all the same so far as they concern a man's capacity, learning, piety and virtue are included in the following directions in the preface to the form of ordaining deacons, which is in some degree an enlargement of the foregoing restrictions: viz.

“The bishop knowing, either by himself, or by sufficient testimony, any person to be a man of virtuous conversation, and without crime; and after examination and trial, finding him learned in the Latin tongue, and sufficiently instructed in holy Scripture, may admit him a deacon.”

And by Canon 34, the direction is this: “No bishop shall admit any person into sacred orders, except he hath taken some degree of school in either of the two universities; or at the least, except he be able to yield an account of his faith in Latin according to the Thirty-nine Articles.”

And with respect unto *priest's* orders in particular, it is thus

(*l*) Lind. 33.

(*m*) Ibid.

(*n*) Lind. 26.

directed by the statute of the 13 Eliz. c. 12, "None shall be made minister, unless it appear to the bishop that he is of honest life, and professeth the doctrine expressed in the Thirty-nine Articles; nor unless he be able to answer, and render to the ordinary an account of his faith in Latin, according to the said articles, or have special gift or ability to be a preacher."

So that if these requisites be observed, those others are not now required, further than they fall in with these.

And the ordinary way by which all this must appear to the bishop, must be by a written testimonial; concerning which it is directed by canon 34 aforesaid, with respect both unto deacon's and priest's orders, that no bishop shall admit any person into sacred orders, except he shall "then exhibit letters testimonial of his good life and conversation, under the seal of some college of Cambridge or Oxford, where before he remained, or of three or four grave ministers, together with the subscription and testimony of other credible persons, who have known his life and behaviour for the space of three years next before."

And with respect unto *priest's* orders in particular, it is enacted by the aforesaid statute of the 13 Eliz. c. 12, "That none shall be made minister, unless he first bring to the bishop of that diocese, from men known to the bishop to be of sound religion, a testimonial both of his honest life, and of his professing the doctrine expressed in the Thirty-nine Articles."

Some of the canons abroad do further require, that proclamation be thrice made in the parish church where the person who offereth himself to be ordained inhabiteth, in order to know the impediments if any be; which the minister of such parish is to certify to the bishop or his official: particularly, the council of Trent requires this, and that it be done by the command of the bishop, upon signification made to him, a month before, of the name of the person who desires to be ordained: not unlike to which is this clause in the articles of Queen Elizabeth, published in the year 1564, viz. "against the day of giving orders appointed, the bishop shall give open monitions to all men, to except against such as they know not to be worthy, either for life or conversation (*o*)."

Agreeable unto which are Archbishop Wake's directions to the bishops of his province in the year 1716, subjoined at the end of this title, which although they have not the authority of a *law* properly so called, yet since it is said to be discretionary in the bishop whom he will admit to the order of priest or deacon, and that he is not obliged to give any reason for his refusal (*p*), this implieth, that he may insist upon what previous terms of qualification he shall think proper, consistent

(*o*) Gibs. 147.

(*p*) 1 Still. 334; 1 Johns. 46; Wood, b. 1, c. 3.

with law and right. And by the statute, rubric, and canon aforegoing, he is not required, but permitted only, to admit persons so and so qualified; and prohibited to admit any without, but not enjoined to admit any persons although they have such and such qualifications.

Examination.

4. By Canon 35, "The bishop, before he admit any person to holy orders, shall diligently examine him, in the presence of those ministers that shall assist him at the imposition of hands; and if the bishop have any lawful impediment, he shall cause the said ministers carefully to examine every such person so to be ordered. And if any bishop or suffragan shall admit any to sacred orders who is not so examined, and qualified as before we have ordained (*q*); the archbishop of his province having notice thereof, and being assisted therein by one bishop, shall suspend the said bishop or suffragan so offending, from making either deacons or priests for the space of two years.

Of common right, this examination pertaineth to the archdeacon, saith Lindwood; and so saith the canon law, in which this is laid down, as one branch of the archidiaconal office. Which thing is also supposed in our own form of ordination, both of priests and deacons, where the archdeacon's office is to present the persons that are apt and meet (*r*).

And for the regular method of examination, we are referred by Lindwood to the canon upon that head, inserted in the body of the canon law; viz. "When the bishop intends to hold an ordination, all who are desirous to be admitted into the ministry, are to appear on the fourth day before the ordination; and then the bishop shall appoint some of the priests attending him, and others skilled in the divine law, and exercised in the ecclesiastical sanctions, who shall diligently examine the life, age, and title of the persons to be ordained; at what place they had their education; whether they be well learned; whether they be instructed in the law of God. And they shall be diligently examined for three days successively; and so, on the Saturday, they who are approved shall be presented to the bishop (*s*).

Letters dimissory.

5. By a constitution of Archbishop Reynolds: "Persons of religion shall not be ordained by any but their own bishop, without letters dimissory of the said bishop; or, in his absence, of his vicar general (*t*)."

And by Canon 34, "No person shall henceforth admit any person into sacred orders, which is not of his own diocese, except he be either *of one of the universities* of this realm, or except he shall bring letters dimissory from the bishop of whose diocese he is."

One of the Universities.]—That is, a member of some

(*q*) Viz., in Canon 34.

(*r*) Gibs. 147.

(*s*) Gibs. 147. See Dist. 24, c. 5.

(*t*) Lind. 32.

college, so far as he may be ordained *ad titulum collegii sui* (u).

In the ancient acts of ordination, the fellows of New College, St. Mary Winton, and King's College in Cambridge, are mentioned as possessed of a special privilege from the pope, to be ordained by what bishops they pleased; and they are said to be *sufficienter dimissi*, in virtue of that privilege, and without letters dimissory. But it doth not appear by our books, that this was then that general right of all colleges in the two universities, to which they are entitled by virtue of this canon (x).

And by a constitution of Richard Wethershead, archbishop of Canterbury, a bishop ordaining one of another diocese without special licence of the bishop of that diocese, shall be suspended from the conferring of that order to which he shall ordain any such person, until he shall have made a proper satisfaction (y).

And by Can. 35, "If any bishop or suffragan shall admit any to sacred orders who is not so qualified, as before we have ordained, the archbishop of his province, having notice thereof, and being assisted therein by one bishop, shall suspend the said bishop or suffragan so offending, from making either deacons or priests, for the space of two years; and, by the ancient canon law, from granting letters dimissory to the persons of his diocese who are to be ordained (z).

And they who shall be promoted to holy orders by other than their own bishop, without licence of their own bishop, shall be suspended from the exercise of such order until they shall obtain a dispensation (a).

But a dispensation in such case by their own bishop shall be sufficient, who may ratify such ordination (b).

And in our ecclesiastical records we find several persons dispensed with, in form, for obtaining orders without such letters, as a great irregularity, which was looked upon as needful for the ratification of the order received (c).

The *archbishop*, as metropolitan, may not grant letters dimissory, but this is to be understood with an exception to the time of his metropolitical visitation of any dioceses, during which he may both grant letters dimissory and ordain the clergy of the diocese visited (d).

So neither the *archdeacon*, nor *official*, may grant letters dimissory. Concerning the *archdeacon*, the canon law is express; and as to the *officials*, they are excluded by the same constitution that excludes the religious; and the ancient gloss, speaking of officials, says, Although it cannot be denied that they have ordinary jurisdiction, yet recourse is not to be had

(u) Grey, 45.

(x) Gibs. 142.

(y) Lind. 32.

(z) Gibs. 143.

(a) Edm. Lindw. 26.

(b) Ibid.

(c) Gibs. 142.

(d) Gibs. 143.

to them in every thing, for they cannot grant letters commendatory for orders (*e*).

During the *vacancy* of any see, the right of granting letters dimissory within that see, rests in the guardian of the spiritualities; and, in consequence, the right of ordaining also, where such guardian is of the episcopal order (*f*).

A bishop being in parts *remote*, he who is specially constituted vicar-general for that time, hath power to grant letters dimissory; and the reason is, because during that time, the whole episcopal jurisdiction is vested in him; as it is also in persons who enjoy jurisdictions entirely exempt from the bishop, and who therefore may likewise grant them (*g*).

The persons *to whom* letters dimissory may be granted by any bishop, are either such who were born in the diocese, or are promoted in it, or are resident in it. This appears from Lindwood, in his commentary upon the foregoing constitution of Archbishop Reynolds, whose observation is taken from the body of the canon law. But although this is laid down disjunctively, so as letters dimissory granted in any of the three cases will be good, yet it appears in practice, that heretofore they were judged to come more properly from the bishop in whose diocese he was promoted, or in which his title lay. And the reason was, because the bishop in whose diocese the person was born, or had long dwelt, is presumed to have the best opportunity of knowing the conversation of the person to be ordained (*h*).

The *fitness* of the person to be ordained (as to life, learning, title, and the like) ought to appear, before the granting of letters dimissory. This is supposed (as to conversation at least) in what hath been said before; and as to the title, it was not only inquired into by the bishop granting the letters, but frequently remained with him, of which special notice was taken in the body of such letters. And the bishop who grants the letters dimissory is to make this inquiry, and not the bishop to whom such letters are transmitted, for he is to presume that the persons recommended to him are fit and sufficient (*i*).

Letters dimissory may be granted at once to *all orders*, and directed to any catholic bishop at large. And this hath been the practice in the Church of England, both before and since the Reformation, as appears by innumerable instances, in the acts of ordination, of *literæ dimissoriæ ad omnes*, and by the forms of the letters dimissory (whether *ad omnes* or not) which are directed in that general style. But other churches, to prevent the inconveniences of this practice (especially where such letters are granted without previous examination), have expressly forbid them both (*k*).

(*e*) Gibs. 143.

(*f*) Ibid.

(*g*) Gibs. 143.

(*h*) Ibid.

(*i*) Gibs. 144.

(*k*) Ibid.

V. *Of Oaths and Subscriptions previous to the Ordination.*

1. By the 1 Eliz. c. 1, and 1 Will. c. 8, "Every person taking orders, before he shall receive or take any such orders, shall take the oaths of allegiance and supremacy, before the ordinary or commissary."

2. And by the 13 Eliz. c. 12, s. 5, "None shall be admitted to the order of deacon, or ministry, unless he shall first subscribe to all the articles of religion agreed upon in convocation in the year 1562, which only concern the confession of the true Christian faith and the doctrine of the sacraments."

3. And by Can. 36, "No person shall be received into the ministry, except he shall first subscribe to these articles following:—

"(1) That the king's majesty, under God, is the only supreme governor of this realm, and of all other his highness's dominions and countries, as well in all spiritual or ecclesiastical things or causes as temporal; and that no foreign prince, person, prelate, state or potentate, hath, or ought to have, any jurisdiction, power, superiority, pre-eminence or authority, ecclesiastical or spiritual, within his majesty's said realms, dominions, and countries.

"(2) That the Book of Common Prayer, and of ordering of bishops, priests and deacons, containeth in it nothing contrary to the word of God, and that it may lawfully be used, and that he himself will use the form in the said book prescribed in public prayer, and administration of the sacraments, and none other.

"(3) That he alloweth the book of articles of religion agreed upon by the archbishops and bishops of both provinces, and the whole clergy, in the convocation holden at London, in the year of our Lord God 1562, and that he acknowledgeth all and every the articles therein contained, being in number nine-and-thirty, besides the ratification, to be agreeable to the word of God."

Which subscription, as it seemeth by the same and the following canon, must be before the bishop himself.

And for the avoiding of all ambiguities, such person shall subscribe in this form and order of words, setting down both his christian and surname, viz. "I, N. N. do willingly and *ex animo* subscribe to these three articles, above-mentioned, and to all things that are contained in them (l)."

And if any bishop shall ordain any, except he shall first have so subscribed, he shall be suspended from giving of orders for the space of twelve months (m).

 VI. *Form and Manner of ordaining Deacons.*

1. The ordination (as well of deacons as of ministers) shall be performed in the time of divine service, in the presence not

(l) Can. 36.

(m) Ibid.

only of the archdeacon, but of the dean and two prebendaries at the least, or (if they shall happen by any lawful cause to be let or hindered) in the presence of four other grave persons, being masters of arts at the least, and allowed for public preachers (*n*).

And by the statute of the 21 Hen. 8, c. 13, s. 24, for pluralities; it is alleged as one reason why a bishop may retain six chaplains, because he must occupy six chaplains at the giving of orders.

However, in practice, a less number than is required either by the said statute or by the aforesaid canon, is sometimes admitted; and this (as it is said) by virtue of the rubric in the office of ordination, which directeth *that the bishops with the priests present shall lay their hands upon the persons to be ordained*; implying, as is supposed, that if there are but two priests present, it sufficeth by this rubric, which is established by the act of parliament of the 13 & 14 Car. 2. But the words do not seem so much to be restrictive of the number before required, as directory what that number as by law before required in this respect shall do.

2. And at the time of ordination, the bishop shall say unto the people, "Brethren, if there be any of you, who knoweth any impediment, or notable crime, in any of these persons presented to be ordered deacons, for the which he ought not to be admitted to that office, let him come forth in the name of God, and show what the crime or impediment is (*o*)."

And if any great crime or impediment be objected, the bishop shall surcease from ordering that person, until such time as the party accused shall be found clear of that crime (*p*).

3. And before the gospel, the bishop sitting in his chair, shall cause the said oaths of allegiance and supremacy to be (again) ministered unto every of them that are to be ordered (*q*).

The 24 Geo. 3, c. 35, after reciting that by the laws of the realm, persons who are admitted into holy orders must take the oath of allegiance; and that there are divers subjects of foreign countries desirous that the word of God and the sacraments should be administered to them, according to the liturgy of the Church of England, by subjects or citizens of the said countries, ordained according to the form of ordination in the Church of England, empowers the Bishop of London or any other bishop to be by him appointed, to admit to the order of deacon or priest for the purposes aforesaid, persons subjects or citizens of countries out of his majesty's dominions, without requiring them to take the said oath of allegiance. But they are not to exercise their office within his majesty's dominions; and

(*n*) Can. 31.

(*o*) Form of Ordination.

(*p*) Form of Ordin.

(*q*) Ibid. 1 W. c. 8.

this exemption from taking the above oath is to be mentioned in their testimonial (r).

4. Then the bishop, laying his hands severally upon the head of every one of them, humbly kneeling before him, shall say, "Take thou authority to execute the office of a deacon in the Church of God committed unto thee; in the name of the Father, and of the Son, and of the Holy Ghost. Amen."

Then shall the bishop deliver to every one of them the New Testament, saying, "Take thou authority to read the Gospel in the Church of God, and to preach the same, if thou be thereto licensed by the bishop himself(s)."

5. Finally it must be declared unto the deacon, that he must continue in that office of a deacon the space of a whole year (except for reasonable causes it shall otherwise seem good unto the bishop), to the intent he may be perfect and well expert in the things appertaining to the ecclesiastical administration; in executing whereof, if he be found faithful and diligent, he may be admitted by his diocesan to the order of priesthood (t).

VII. *Form and Manner of ordaining Priests.*

1. Can. 32. "The office of a deacon being a step or degree to the ministry, according to the judgment of the ancient fathers and the practice of the Primitive Church, we do ordain and appoint, that hereafter no bishop shall make any person, of what qualities or gifts soever, a deacon and a minister both together upon one day; but the order in that behalf prescribed in the book of making and consecrating bishops, priests and deacons be strictly observed. Not that always every deacon should be kept from the ministry for a whole year, when the bishop shall find good cause to the contrary, but that there being now four times appointed in every year for the ordination of deacons and ministers, there may ever be some time of trial of their behaviour in the office of deacon, before they be admitted to the order of priesthood."

2. At the time of ordination, the bishop shall say unto the people: "Good people, these are they whom we purpose, God willing, to receive this day unto the holy office of priesthood: for after due examination, we find not to the contrary, but that they be lawfully called to their function and ministry, and that they be persons meet for the same. But yet if there be any of you, who knoweth any impediment or notable crime in any of them, for the which he ought not to be received into this holy ministry, let him come forth in the name of God and show what the crime or impediment is."

(r) For the consecration of bishops under similar circumstances, see tit. *Bishops*, II. 17.

(s) Form of Ordin.
(t) Ibid.

And if any great crime or impediment be objected, the bishop shall surcease from ordering that person, until such time as the party accused shall be found clear of that crime (*u*).

3. Then the bishop, sitting in his chair, shall minister to every one of them the oaths aforesaid of allegiance and supremacy (*x*).

4. Then the bishop, *with the priests present*, shall lay their hands severally upon the head of every one that receiveth the order of priesthood; the receivers humbly kneeling upon their knees, and the bishop saying, "Receive the Holy Ghost for the office and work of a priest in the Church of God, now committed unto thee by the imposition of our hands: Whose sins thou dost forgive, they are forgiven; and whose sins thou dost retain, they are retained. And be thou a faithful dispenser of the word of God, and of his holy sacraments: In the name of the Father, and of the Son, and of the Holy Ghost."

Then the bishop shall deliver to every one of them kneeling, the Bible into his hand, saying, "Take thou authority to preach the word of God, and to minister the holy sacraments in the congregation, where thou shalt be lawfully appointed thereunto."

With the Priests present.]—By Can. 35, "They who assist the bishop in laying on of hands, shall be of the cathedral church, if they may be conveniently had, or other sufficient preachers of the same diocese, to the number of three at the least."

VIII. Fees for Ordination.

1. By a constitution of Archbishop Stratford: For any letters of orders, the bishops, clerks or secretaries shall not receive above 6*d.*; and for the sealing of such letters, or to the *marshals of the bishops house* for admittance, to *porters, hostiaries* or *shavers* nothing shall be paid: on pain of rendering double within a month, and for default thereof, the offender, if he is a clerk beneficed, shall be suspended from his office and benefice; if he is not beneficed or a lay person, he shall be prohibited from the entrance of the church till he comply (*y*).

Marshals.]—They who govern the hall and inner parts of the house (*z*).

Hostiaries.]—Lindwood understandeth this word to signify the same as *ostiaries*, or persons appointed to keep the *doors*, and the word *janitores* (*porters*) next aforegoing to signify those who keep the *gates*, whereas more properly, it seemeth that *janitores* (or *porters*) doth express both of these, and that the word *hostiarij* (as Dr. Gibson observeth) doth denote those persons who prepared the *host*; for there is in the Roman

(*u*) Form of Ordin.

(*y*) Lindw. 222.

(*x*) Ibid. 1 W. c. 8. *Vide Supra*,

(*z*) Ibid.

pontifical a rubric in the ordination of priests, that the bishop shall deliver to the person to be ordained, the cup with wine and water, and the paten laid upon it with the host, the bishop saying unto him, "Take thou authority to offer sacrifice to God, and to celebrate mass as well for the living as for the dead, in the name of God (a)."

Shavers.]—Whose office was to shave the crowns of persons to be ordained (b).

2. And by Can. 35, "No fee or money shall be received either by the archbishop or any bishop or suffragan, either directly or indirectly, for admitting any person into sacred orders; nor shall any other person or persons under the said archbishop, bishop or suffragan, for parchment, writing, wax, sealing, or any other respect thereunto appertaining, take above 10s.: under such pains as are already by law prescribed."

Or any other respect thereunto appertaining—above 10s.]—It is not lawful, saith John de Athon, to give any thing to the notary performing the duty of his office in the act of ordination; nevertheless, he says, it is otherwise as to that notary or register who writes letters testimonial for those that are ordained, for his just salary, or somewhat more for his extraordinary trouble, although this may more securely be given voluntarily without a preceding compact (c).

And some of the modern constitutions abroad agreeing to the reasonableness of this, have by way of restraint upon the officer, fixed the fee of writing and the other particulars, in like manner as this canon and the foregoing constitution of Archbishop Stratford have done in our Church. For the *letters testimonial* of ordination are no part of the ordination, but only taken afterwards for the security of the person ordained; and therefore the same John de Athon in the place above-mentioned says, "It is *safe* (not *necessary*) for the persons ordained, to have with them the said writing or letters testimonial of ordination under the bishop's seal, containing the names of the person ordaining and of the person ordained, and the taking of such orders, and the time and place of ordination and the like (d)."

IX. *Simoniactal Promotion to Orders.*

By the 31 Eliz. c. 6, s. 10, "If any person shall receive or take any money, fee, reward, or any other profit directly or indirectly, or shall take any promise, agreement, covenant, bond, or other assurance to receive or have any money, fee, reward, or any other profit directly or indirectly, either to himself or to any other of his friends, (all ordinary and lawful fees only ex-

(a) Gibs. 153.

(b) Lindw. 222.

(c) Otho. *De Scrutin. Ordin.* v.

Scriptura. Athon. 16.

(d) Gibs. 154.

cepted), for or to procure the ordaining or making of any minister, or giving of any orders or licence to preach, he shall forfeit 40*l.* and the person so corruptly ordained 10*l.*; and if at any time within seven years next after such corrupt entering into the ministry or receiving of orders, he shall accept any benefice or promotion ecclesiastical, the same shall be void immediately upon his induction, investiture or installation, and the patron shall present or collate, or dispose of the same as if he were dead: one moiety of which forfeitures to be to the king, and the other to him that shall sue."

X. *General Office of Deacons.*

"It appertaineth to the office of a deacon, in the church where he shall be appointed to serve, to assist the priest in divine service, and specially when he ministereth the holy communion, and to help him in distribution thereof, and to read the holy scriptures, and homilies in the church; and to instruct the youth in the catechism; in the absence of the priest to baptize infants; and to preach if he be licensed thereto by the bishop himself; and furthermore it is his office, where provision is so made, to search for the sick poor and impotent people of the parish, and to intimate their estates, names and places where they dwell, unto the curate; that by his exhortation they may be relieved with the alms of the parishioners or others (e)."

To assist the Priest in Divine Service.]—Anciently, he officiated under the presbyter, in saying responses, and repeating the confession, the creed, and the Lord's prayer after him, and in such other duties of the church as now properly belong to our parish clerks; who were heretofore real clerks, attending the parish priest in those inferior offices (f).

And specially when he ministereth the Holy Communion.]—But by the 13 & 14 Car. 2, c. 4, s. 14. "No person shall presume to consecrate the sacrament of the Lord's supper, before such time as he shall be ordained priest; on pain of 100*l.*, half to the king, and half to be equally divided between the poor of the parish where the offence shall be committed, and him who shall sue in any of his majesty's courts of record; and to be disabled from being admitted to the order of priest for one whole year then next following."

Sect. 15. "But this not to extend to foreigners or aliens of the foreign reformed churches allowed by the king."

Also, by the act of toleration this shall not extend to qualified protestant dissenting ministers.

And to read the Holy Scriptures.]—This power is expressly given to him in the act of ordination before mentioned.

To search for the sick, poor, and impotent.]—This is the

(e) Rubr. in the form of ordin.

(f) Gibs. 150.

most ancient duty of a deacon, and the immediate cause of the institution of the order. This rule was made in England while the poor subsisted chiefly by voluntary charities, and before the settlement of rates or other fixed and certain provisions; pursuant to which provision, our laws have devolved that care upon the churchwardens and overseers of the poor; which last office was created on purpose for that end (g).

And to intimate their Estates, Names and Places where they dwell, unto the Curate.—That is, to the rector or vicar, who hath the cure of souls.

And here it is obvious to remark the ambiguity of the word *curate*, as was before observed of the word *minister*: sometimes it expresseth the person, whether priest or deacon, who officiateth under the rector or vicar, employed by him as his assistant, or to supply the place in his absence; sometimes it denoteth the person officiating in general, whether he be rector, vicar, or assistant curate, or whosoever performeth the service for that time: sometimes it denoteth exclusively (as in this place) the rector, vicar, or person beneficed, who hath *curam animarum*.

So far the office of a deacon is to be collected from the rubric in the form of ordination, and from the form itself. And forasmuch as he is hereby permitted to baptize, catechise, to preach, to assist in the administration of the Lord's supper; so also by parity of reason he hath used to solemnize matrimony, and to bury the dead (h).

And in general it seemeth, that he may perform all the other offices in the liturgy, which a priest can do, except only consecrating the sacrament of the Lord's supper (as hath been said), and except also the pronouncing of the *absolution*.

Indeed it is not clear from the rubric in the Book of Common Prayer, whether or how far a deacon is prohibited thereby to pronounce the absolution. For although it is there directed, that the same shall be pronounced by the *priest alone*; yet the word [*alone*] in that place seemeth only to intend, that the people shall not pronounce the absolution after the priest, as they did the confession just before: and the word *priest*, throughout the rubric, doth not seem to be generally appropriated to a person in priest's orders only; on the contrary, almost immediately after it is directed, that the *priest* shall say the "Gloria Patri," and then afterwards that the *priest* shall say the suffrages after the Lord's prayer (which, by the way, in most of the occasional offices are called by mistake the suffrages *after the creed*, or the suffrages *next after the creed*), and it is not supposed that these expressions are to be understood of the *priest* alone, exclusive of a deacon who may happen to perform the service. And here also we may ob-

(g) Gibs. 159.

(h) Wats. c. 14.

serve the ambiguous signification of the word *priest*, as before was observed of the words *minister* and *curate*; sometimes it is understood to signify a person in priest's orders only; at other times, and especially in the rubric, it is used to signify the person officiating, whether he be in priest's or only in deacon's orders: and in general, the words *priest*, *minister*, and *curate* seem indiscriminately to be applied throughout the liturgy, to denote the clergyman who is officiating, whether he be rector, vicar, assistant curate, priest, or deacon.

But the argument to evince that the priest only, and not a deacon, hath power to pronounce the absolution, seemeth most evidently to be deduced from the acts of ordination before mentioned. To the *deacon*, it is said; "Take thou authority to read the gospel, and to preach:" to the *priest*, it is said, "Receive the Holy Ghost. — Whose sins thou dost forgive, they are forgiven; and whose sins thou dost retain, they are retained."

Moreover, until a person is admitted to the order of priesthood, he is not capable of any benefice or ecclesiastical promotion (*i*).

Dr. Gibson refers to the 13 Eliz. c. 12, which enacts, that no person shall be admitted to any benefice unless he be of the age of three and twenty years, and a deacon at the least; and directs that every person admitted to a benefice with cure shall be admitted to minister the sacraments within one year after his induction, if he be not so admitted before, under pain of deprivation (*k*). But the 13 & 14 Car. 2, c. 4, s. 14, extends the restriction by declaring, that no person shall be capable to be admitted to any benefice, nor to administer the sacrament, before such time as he shall be ordained *priest*, according to the form prescribed by the Book of Common Prayer, under the penalty of 100*l*. and disability to be admitted into the order of priest for the space of one year next following (*l*).

And by the statute of the 13 & 14 Car. 2, c. 4, s. 14, "No person shall be capable to be admitted to any parsonage, vicarage, benefice, or other ecclesiastical promotion or dignity, before he be ordained priest: on pain of 100*l*.; half to the king, and half to be equally divided between the poor and the informer."

Neither is a person that is merely a layman, or that is only a deacon, capable of a *donative*: for although he who hath a donative may come into the same by lay donation, and not by admission and institution, yet his function is spiritual (*m*).

So that he who is no more than a deacon can only use his orders either as a chaplain to some family, or as a curate to

(*i*) Gibs. 146.

(*k*) See *Deprivation*, in note.

(*l*) Wats. p. 142.

(*m*) 1 Inst. 344.

some priest, or as a lecturer without title: for the prebendaries of some prebends in cathedral and collegiate churches are to read lectures there, by the appointment of the founders thereof, and may from thence be called lecturers; but these places are of the number of ecclesiastical promotions, to which the incumbents are admitted by collation or institution, of which a deacon as aforesaid is not therefore capable; yet the king's professor of the law within the University of Oxford may have and hold the prebend of Shipton within the cathedral church of Sarum, united and annexed to the place of the same king's professor for the time being, although that the said professor be but a layman (*n*).

XI. *General Office of Priests.*

A priest by his ordination receiveth authority to preach the word of God, and to consecrate and administer the holy communion, in the congregation where he shall be lawfully appointed thereunto.

Yet, notwithstanding, by Canon 36, he may not preach without a licence either of the archbishop, or of the bishop of the diocese where he is placed, under their hands and seals, or of one of the two universities under their seals likewise.

But a licence by the bishop of any diocese is sufficient, although it be only to preach within his diocese; the statute not requiring any licence by the bishop of the diocese where the church is (*o*).

Dr. Watson says, that if a person, who is a mere layman, be admitted and instituted to a benefice with cure, and doth administer the sacrament, marry and the like; these, and all other spiritual acts performed by him during the time he continues parson in fact, are good; so that the persons baptized by him are not to be re-baptized, nor persons married by him to be married again, to satisfy the law (*p*).

XII. *Exhibiting Letters of Orders.*

1. Can. 137. "Every parson, vicar, and curate, shall at the bishop's first visitation, or at the next visitation after his admission, show and exhibit unto him his letters of orders, to be by him either allowed, or (if there be just cause) disallowed and rejected; and being by him approved, to be signed by the register; the whole fees for which, to be paid but once in the whole time of every bishop, and afterwards but half the said fees."

(*n*) Wats. c. 14; 13 & 14 Car. 2, c. 4, s. 29.

(*o*) Wats. c. 14.

(*p*) Ibid.; Cro. Eliz. 775.

2. "No curate shall be admitted to officiate in another diocese, unless he bring with him his letters of orders (q)."

3. Can. 39. "No bishop shall institute any to a benefice who hath been ordained by any other bishop, except he first show unto him his letters of orders."

4. By the 4 Hen. 7, c. 13, "If any person, at the second time of asking his clergy, because he is within orders, hath not there ready his letters of orders, or a certificate of his ordinary witnessing the same; the justices afore whom he is arraigned shall give him a day to bring in his said letters or certificate; and if he fail in so doing, he shall lose the benefit of his clergy, as he shall do that is without orders."

XIII. *Archbishop Wake's Directions to the Bishops of his Province in relation to Orders.*

It is judged proper here to subjoin Archbishop Wake's letter to the bishops of the province of Canterbury, dated June 5, 1716, which, although it concerneth other matters besides those of ordination, yet since the due conferring of orders appeareth to be the principal regard thereof, it seemeth best to insert the same entire in this place; and to refer to it here at large from those other titles, unto which it hath some relation.

As to its authority, it is certain (as hath been observed before) that in itself it hath not the force of law, nor is it so intended, or to be of any binding obligation to the Church, further than the archbishops and bishops from time to time shall judge expedient; I mean, as to those parts of it which only concern matters that the law hath left indefinite, and discretionary in the archbishops and bishops. Other parts thereof are only inforcements of what was the law of the Church before; and those, without doubt, are of perpetual obligation: not by the authority of these injunctions, but by virtue of the laws upon which they are founded.

"My very good lord,

"Being by the providence of God called to the metropolitical see of this province, I thought it incumbent upon me to consult as many of my brethren, the bishops of the same province, as were here met together during this session of parliament, in what manner we might best employ that authority which the ecclesiastical laws now in force, and the custom and laws of this realm, have vested in us, for the honour of God, and for the edification of his Church, committed to our charge: And upon serious consideration of this matter, we all of us agreed in the same opinion that we should, by the blessing of God upon our honest endeavours, in some measure promote these good ends, by taking care (as much as in us lieth) that no

(q) Arund., Lindw. 48.

unworthy persons might hereafter be admitted into the sacred ministry of the Church: nor any be allowed to serve as curates but such as should appear to be duly qualified for such an employ; and that all who officiated in the room of any absent ministers, should reside upon the cures which they undertook to supply, and be ascertained of a suitable recompence for their labours.

“ In pursuance of those resolutions, to which we unanimously agreed, I do now very earnestly recommend to you;

“ (I.) That you require of every person who desires to be admitted to holy orders, that he signify to you his name and place of abode, and transmit to you his testimonial, and a certificate of his age duly attested, with the title upon which he is to be ordained, at least twenty days before the time of ordination; and that he appear on Wednesday, or at farthest on Thursday in ember week, in order to his examination.

“ (II.) That if you shall reject any person, who applies for holy orders upon the account of immorality proved against him, you signify the name of the person so rejected, with the reason of your rejecting him, to me, within one month; that so I may acquaint the rest of my suffragans with the case of such rejected person before the next ordination.

“ (III.) That you admit not any person to holy orders, who having resided any considerable time out of the university, does not send to you, with his testimonial, a certificate signed by the minister, and other credible inhabitants of the parish where he so resided, expressing that notice was given in the church, in time of divine service, on some Sunday, at least a month before the day of ordination, of his intention to offer himself to be ordained at such a time; to the end that any person who knows any impediment, or notable crime, for which he ought not to be ordained, may have opportunity to make his objections against him.

“ (IV.) That you admit not letters testimonial, on any occasion whatsoever, unless it be therein expressed, for what particular end and design such letters are granted; nor unless it be declared by those who shall sign them, that they have personally known the life and behaviour of the person for the time by them certified; and do believe in their conscience, that he is qualified for that order, office, or employment, to which he desires to be admitted.

“ (V.) That in all testimonials sent from any college or hall, in either of the universities, you expect that they be signed, as well as sealed; and that among the persons signing, the governor of such college or hall, or in his absence, the next person under such governor, with the dean, or reader of divinity, and the tutor of the person to whom the testimonial is granted, (such tutor being in the college, and such person being under the degree of master of arts,) do subscribe their names.

“(VI.) That you admit not any person to holy orders upon letters dimissory, unless they are granted by the bishop himself, or guardian of the spiritualities *sede vacante*; nor unless it be expressed in such letters, that he who grants them, has fully satisfied himself of the title and conversation of the person to whom the letter is granted.

“(VII.) That you make diligent inquiry concerning curates in your diocese, and proceed to ecclesiastical censures against those who shall presume to serve cures without being first duly licensed thereunto; as also against all such incumbents who shall receive and employ them, without first obtaining such licence.

“(VIII.) That you do not by any means admit of any minister, who removes from any other diocese, to serve as a curate in yours, without testimony of the bishop of that diocese, or ordinary of the peculiar jurisdiction from whence he comes, in writing, of his honesty, ability, and conformity to the ecclesiastical laws of the Church of England.

“(IX.) That you do not allow any minister to serve more than one church or chapel in one day, except that chapel be a member of the parish church, or united thereunto; and unless the said church or chapel where such a minister shall serve in two places, be not able in your judgment to maintain a curate.

“(X.) That in the instrument of licence granted to any curate, you appoint him a sufficient salary, according to the power vested in you by the laws of the church, and the particular direction of a late act of parliament for the better maintenance of curates.

“(XI.) That in licences to be granted to persons to serve any cure, you cause to be inserted, after the mention of the particular cure provided for by such licences, a clause to this effect (or in any other parish within the diocese, to which such curate shall remove with the consent of the bishop.)

“(XII.) That you take care, as much as possible, that whosoever is admitted to serve any cure, do reside in the parish where he is to serve; especially in livings that are able to support a resident curate: and where that cannot be done, that they do at least reside so near to the place that they may conveniently perform all their duties both in the church and parish.

“These, my lord, were the orders and resolutions, to which we all agreed; and which I do hereby transmit to you; desiring you to communicate them to the clergy of your diocese, with an assurance that you are resolved, by the grace of God, to direct your practice in these particulars agreeably thereunto. And so commending you to the blessing of God in these, and all your other pious endeavours for the service of his Church, I heartily remain,

My very good lord,

your truly affectionate brother,

W. CANT.”

(I.) *That you require of every Person, &c.*]—By this first article six things are required, viz.

(1.) *That he signify to you his Name and Place of Abode.*]—It may be so ordered, that this shall be set forth in the testimonial, or title, or both; but it seemeth rather, that by this article a distinct instrument is required for the signification thereof.

(2.) *And transmit to you his Testimonial.*]—According to the 34th canon, and the fourth and fifth articles of these directions.

(3.) *And a Certificate of his Age duly attested.*]—That is, from the register book, under the hands of the minister and churchwardens of the parish where he was baptized; or, where that cannot be had, by other sufficient testimony.

(4.) *With the Title upon which he is to be ordained.*]—According to the tenor of the thirty-third canon before mentioned.

(5.) *At least twenty Days before the Time of Ordination.*]—By the canons aforesaid, the title and testimonial are required to be exhibited *at* the time of ordination: but by these directions, they are to be transmitted for so long time before, as that there may be an opportunity to make inquiry, if needful, into any of the particulars therein contained.

(6.) *And that he appear on Wednesday, or at farthest on Thursday, in Ember Week.*]—This is agreeable to the canon law before mentioned out of Lindwood, that he shall appear on the fourth day before the ordination.

(II.) *That if you shall reject &c.*]—This second article, of signifying the names of persons rejected for immorality to the archbishop, is a prudent caution; and was not provided for before by any law.

(III.) *That you admit not any Person &c.*]—This article, concerning notice to be given in the church, is also a reasonable provision, and agreeable to foreign practice (as hath been observed) although not particularly enjoined by any law in our church.

In the present directions, as delivered by the archbishops of late years, there is an alteration in this article: instead of the expression, that the minister and others shall certify “that notice was given in the church of his intention to offer himself to be ordained at such a time, *to the end that any person who knows any impediment or notable crime, for the which he ought not to be ordained, may have opportunity to make his objections against him,*” (that is, to the bishop, as it seemeth);—it now runs, that they shall certify, “that such notice was given, *and that upon such notice given no objections have come to their knowledge, for the which he ought not to be ordained,*” (which implies the objections to be notified to the persons signing the certificate.)

(IV.) *That you admit not Letters testimonial &c.*—This and the next article concerning testimonials, are supplementary to the thirty-fourth canon; and for their obligation do depend on these injunctions, and not on any fixed law; and therefore may be varied from time to time, as the archbishops and bishops shall see cause.

(V.) *That in all Testimonials sent from any College &c.*—By the canon, the common seal only of the college was required, which indeed of itself (as in all other bodies corporate) doth imply a consent of the major part of the society: this article doth farther require a *quorum* (as it were); namely, that of the said major part, the head of the college, the dean, and the tutor, be three; and the same to appear by the subscription of their names. So that ordinarily it seemeth to be in the power of any one of those three, to prohibit any person of their college from being ordained; which thing perhaps may require some farther consideration. And it is much to the honour of the universities, that for so long a time there have been no instances of the abuse of this power.

(VI.) *That you admit not any Person into Holy Orders upon Letters dimissory &c.*—The article concerning letters dimissory is only an admonition to put in due execution, what was the law of the church before.

(VII.) *That you make diligent inquiry concerning Curates in your Diocese who shall presume to serve Cures without being first duly licensed.*—The substance of this article, concerning the licensing of curates, was enjoined before by several canons of the church.

(VIII.) *That you do not by any means admit of any Minister, who removes from another Diocese, to serve as a Curate in yours, without Testimony of the Bishop of that Diocese, of his honesty, ability, &c.*—This article, concerning curates bringing testimonials from other dioceses, is nearly in the words of the forty-eighth canon.

In the present rules, instead of the word *honesty* (which is taken from the canon), are inserted the words *good life*.

(IX.) *That you do not allow any Minister to serve more than one Church or Chapel in one Day.*—This article also is in the words of the forty-eighth canon.

(X.) *That in the Instrument of Licence granted to any Curate, you appoint him a sufficient Salary, according to the Power vested in you by the Laws of the Church.*—There seemeth to be no particular law of the church, by which any certain sum is limited for the stipend of curates in general, but such as are obsolete and ineffectual by reason of the great alteration in the value of money. But the ordinary may refuse to license the curate, unless the incumbent shall in his nomination and appointment promise to pay unto the curate such a certain annual sum.

And the particular direction of a late Act of Parlia-

ment.]—Which act is that of the 12 Ann. st. 2. c. 12, for the curates and non-residents only; by which the ordinary hath power, according to the value of the living and the difficulty of the cure, to appoint a salary not exceeding fifty pounds a year, nor less than twenty.

(XI.) The clause to be inserted in the licence, that the same shall serve for *any other parish within the diocese*, is not enjoined by any express law, but is very reasonable, being intended for the benefit of curates, that having been once examined and approved by the ordinary, they shall not need to be at the expense of a new licence for any other place unto which they shall remove within the diocese.—Which clause is omitted out of the present directions, supposing it perhaps to be unnecessary, in a matter the utility whereof is self-evident.

(XII.) This article concerning *the curate's residence within the parish* is agreeable to the ancient laws of the church: and if the curate shall not comply with the ordinary's directions therein, the said ordinary may withdraw his licence.

To these directions, two others have been subjoined of late years:

One is, *That you be very cautious in accepting resignations; and endeavour, with the utmost care, by every legal method, to guard against corrupt and simoniacal presentations to benefices.*]—This seemeth to be intended to counteract the purpose of bonds of resignation; for if the bishop will not accept, the resignation is ineffectual.

The other is, *That your clergy be required to wear their proper habits, preserving always an evident and decent distinction from the laity in their apparel; and to show, in their whole behaviour, that seriousness, gravity and prudence, which becomes the function; abstaining from all unsuitable company and diversions.*]—The word *canonical*, with respect to the habit, seems here to have been purposely omitted; since no certain standard of dress can be conveniently limited by any canon or other law; and therefore general directions can only be applicable in such cases.

Upon the whole, with respect to the matter before us, whilst these directions continue to be the rule in practice, there are these five instruments to be transmitted to the bishop, at least twenty days before the time of ordination, by every person desiring to be ordained; viz.

First, a signification of his name and place of abode.

Secondly, a certificate of publication having been made in the church, of his design to enter into holy orders.

Thirdly, letters testimonial of his good life and behaviour.

Fourthly, certificate of his age.

Fifthly, the title upon which he is to be ordained.

And moreover, if he comes for priest's orders, he must exhibit to the bishop his letters of orders for *deacon*.

Form of a Title for Orders.

There is no particular form of a title prescribed by any canon, or other law: that which is most usual and approved seemeth to be as followeth:

To the Right Reverend Father in God Richard Lord Bishop of London.

These are to certify your lordship, that I, A. B., rector [or, vicar] of —, in the county of —, and your lordship's diocese of London, do hereby nominate and appoint C. D. to perform the office of a curate in my church of — aforesaid, and do promise to allow him the yearly sum of — for his maintenaunce in the same, and to continue him to officiate in my said church until he shall be otherwise provided of some ecclesiastical preferment, unless by fault by him committed he shall be lawfully removed from the same. And I do solemnly declare, that I do not fraudulently give this certificate only to entitle the said C. D. to receive holy orders, but with a real intention to employ him in my said church according to what is before expressed. Witness my hand this — day of —, in the year of our Lord —.

Form of a Testimonial for Orders.

The canon and the statute before mentioned evidently make a distinction between the testimonial for deacon's, and the testimonial for priest's orders. In pursuance whereof, for deacon's orders, no more by the canon seemeth to be required than this:

If it is from a college;

We the master and fellows of — college, in —, do hereby testify, that A. B., whose life and behaviour we have known for the space of three years now last past, is a person of good life and conversation. Given under the seal of our college, the — day of — in the year of our Lord —.

If it is not from a college;

We whose names and seals are hereunto set, do hereby testify, that A. B., whose life and behaviour we have known for the space of three years now last past, is a person of good life and conversation. Given under our hands and seals, the — day of — in the year of our Lord —.

But something more is required in the testimonial for priest's orders by the aforesaid statute of the 13 Eliz. c. 12. As thus:

We — do hereby testify, that A. B., whose life and behaviour we have known for the space of three years now last past, is a person of good and honest life and conversation, and professeth the doctrine expressed in the articles of religion agreed upon by the archbishops and bishops of both provinces, and the whole clergy in the convocation holden at London in the year of our Lord one thousand five hundred and sixty two. Given under &c.

But by the aforesaid directions of Archbishop Wake, somewhat further is required in the testimonial both for deacon's and for priest's orders; namely, (1) that the same do express for what particular end and design it is granted; and (2) that

the persons signing the same do declare therein, that they have personally known the life and behaviour of the person for the time by them certified; and (3) that they do believe in their conscience, that he is qualified for that order, office or employment to which he desires to be admitted; and (4) that if the testimonial is from a college, it be *signed* as well as sealed by the particular members of the college therein specified.

It doth not appear to have been clearly understood, what the intention was in directing that the testimonial should express *for what particular end and design it is granted*: the causes usually alleged are, that it is a man's duty to bear witness to the truth; that the party hath requested such testimonial; and that they are willing to comply with such request: But these (such as they are) are *general* reasons, and do not at all express the special end and design of granting such a particular testimonial. However, the usual form of a testimonial, according to Mr. Ecton, is to this effect:

"To all Christian people to whom these presents may come.

"Whereas piety and humanity do oblige us to bear witness to the truth; and whereas A. B. bachelor of arts hath requested our letters testimonial of his laudable life and probity of manners to be granted to him: We, being willing to comply with his so just a request, do testify by these presents, that the aforesaid A. B. having been personally known to us for the space of three years last past, hath led his life piously, soberly and honestly; hath diligently applied himself to his studies; and hath not (so far as we know) ever held, written or taught any thing but what the Church of England approves of and maintains; and moreover we think him worthy (if it shall so seem good to those whom it may concern) to be promoted to the holy order of deacon (or priest). In witness whereof we have hereunto set our hands, the — day of — in the year of our Lord —."

Or thus (according to Dr. Grey):

"To the Right Reverend Father in God Richard Lord Bishop of Lincoln.

"Whereas A. B. of — College in — desiring to be admitted to the holy order of deacon [or priest], hath requested our letters testimonial of his laudable life and integrity of manners to be granted to him; We whose names are under written do testify by these presents, that the aforesaid A. B. for three years last past, of our personal knowledge, hath led his life piously, soberly and honestly, hath diligently applied himself to the study of good learning, and hath not (so far as we know) held or published any thing but what the Church of England approves of and maintains; and moreover we think him worthy to be admitted to the holy order of deacon (or priest). In witness whereof we have hereunto subscribed our names, the — day of — in the year of our Lord —."

But in order to accommodate the same more strictly to the aforesaid canon, statute and direction of Archbishop Wake, perhaps the form might be more regularly thus:

"To the Right Reverend Father in God Charles Lord Bishop of Carlisle.

"Whereas our beloved in Christ, A. B. bachelor of arts, hath de-

clared unto us his intention of offering himself a candidate for the holy order of deacon ; and for that end hath requested our letters testimonial of his good and honest life and conversation and other due qualifications, to be granted to him ; We whose names and seals are hereunto set, do testify by these presents, that we have personally known the life and behaviour of the aforesaid A. B. for the space of three years now last past ; and that he hath, during the said time, been a person of good and honest life and conversation ; and that he professeth the doctrine expressed in the Articles of Religion agreed upon by the archbishops and bishops of both provinces, and the whole clergy, in the Convocation holden at London in the year of our Lord one thousand five hundred and sixty-two ; and we do believe in our consciences, that the said A. B. is qualified to be admitted (if it shall so please your lordship), to the holy order of deacon [or priest]. Given under our hands and seals the — day of — in the year of our Lord —."

*Hath declared unto us his Intention of offering himself a Candidate for the Holy Order of Deacon.]—*This, according to the archbishop's directions, seemeth to express the particular end and design for which the testimonial is granted.

*That we have personally known the Life and Behaviour, &c.]—*And not by way of recital, *whose life and behaviour we have known, or having been personally known unto us, or the like ;* for the archbishop's directions in this case do require a positive declaration.

*And that he hath during the said Time been a Person of good and honest Life and Conversation.]—*This is required by the canon and the statute aforesaid : And herein the persons signing the testimonial do undertake for his *behaviour*.

*And that he professeth the Doctrine, &c.]—*Herein they undertake for his *orthodoxy* : and this by the statute aforesaid is required to be peremptory and express ; and not *so far as we know, or the like, for it is possible they may not have used the proper means of information.*

*And we do believe in our Consciences, &c.]—*In order to the forming of which belief, some sort of previous examination of the party by the persons signing the testimonial, seemeth to be implied : And herein they undertake for his *learning*. Whereas, before, for *deacon's* orders, they did only take upon them the knowledge of his *behaviour* ; for *priest's* orders, of his *behaviour* and *orthodoxy* ; but now for *both* by these directions, they are to take upon them the knowledge of his *behaviour, orthodoxy* and *learning* : Although this last is most properly the bishop's province, and not at all the less so, notwithstanding such testimonial (q).

(q) [The sequel of the passage from the Preface to the Ordination Service cited above, p. 39, is, "And therefore to the intent that these orders may be continued, and reverently used and esteemed in the Church of England, no man shall be accounted or taken

to be a lawful bishop, priest or deacon in the Church of England, or suffered to execute any of the said functions, except he be called, tried, examined and admitted thereunto according to the form hereafter following, or *hath had formerly episcopal consecration or*

Organ—See **Church**.

Ornaments of the Church—See **Church**.

Osculatory.

THE *osculatory* was a tablet or board with the picture of Christ, or the blessed Virgin, or some other of the saints; which, after the consecration of the elements in the eucharist, the priest first kissed himself and then delivered it to the people for the same purpose.

Ostiary.

OSTIARY is one of the five inferior orders in the Roman Church, whose office it is to keep the doors of the church and to toll the bell (*r*).

Overseers of a Will—See **Will**.

Oxford—See **Colleges**.

Pall.

THE *pall*, *pallium episcopale*, is a hood of white lamb's wool to be worn as doctors' hoods upon the shoulders, with four crosses woven into it. And this *pallium episcopale* is the arms belonging to the see of Canterbury (*s*).

ordination," on these last words, Bp. Gibson (vol. i. p. 99), remarks, "This last clause seems designed to allow of *Romish converted priests*, who were ordained by bishops before, and whom we receive without re-ordination (if they renounce their errors), because that Church preserves the Order of *Bishops* and the *substance* of the primitive forms in her ordinations, though corrupted with many modern superstitious rights." Compare the 14th sect. of 13 & 14 Car. 2, Act of Uniformity, "unless he have been *formerly* made a priest by episcopal

ordination," under **Public Worship**, and the 3rd sect. of 39 Geo. 3, c. 60, and the 6th sect. of 3 & 4 Vict. c. 33, under **Church in the Colonies**. There have been several instances of Roman priests admitted into our Church, but I am not aware of any case which has given rise to a discussion on the validity of orders conferred by a bishop of the Greek Church. See Palmer on Romish orders in his *Antiquities of the English Ritual*.—Ed.]

(*r*) Gibs. 99.

(*s*) God. 23; 1 Warn. 45.

Pannage.

PANNAGE, *pasnage* (perhaps from *pasco*, to feed), is the fruit of trees which the swine or other cattle feed upon in the woods; as acorns, crabs, mast of beech, chesnuts, and other nuts and fruits of trees in the woods: which is treated of under the title **Tithes**.

Sometimes also *pannage* is used to signify the money which is paid for the pannage itself.

Papist—See **Popery**.

Paraphernalia.

PARAPHERNALIA, from *παρά*, *præter*, and *φεγνή*, *dos*, are the woman's apparel, jewels and other things, which in the lifetime of her husband she wore as the ornaments of her person, to be allowed at the discretion of the court, according to the quality of her and her husband (*t*).

Which is treated of under the title **Wills**, Vol. V. and **Marriage**, Vol. II.

Pardon.

1. **IT** seemeth to have been always agreed, that the king's pardon will discharge any suit in the spiritual court *ex officio*: also it seems to be settled at this day, that it will likewise discharge any suit in such court *ad instantiam partis pro reformatione morum* or *salute animæ*, as for defamation, or laying violent hands on a clerk, or such like; for such suits are in truth the suits of the king, though prosecuted by the party (*u*).

2. Also it seems to be agreed, that if the time to which such pardon hath relation be prior to the award of costs to the party, it shall discharge them: and it seems to be the general tenor of the books, that though it be subsequent to the award of the costs, yet if it be prior to the taxation of them, it shall discharge them, because nothing appears in certain to be due for costs before they are taxed (*x*).

3. Also, if a person be imprisoned on a writ *de excommunicato capiendo*, for his contumacy in not paying costs, and afterwards the king pardons all contempts, it seems that he shall be discharged of such imprisonment without any *scire facias* against the party; because it is grounded on the con-

(*t*) Law of Test. 383.

(*u*) 2 Haw. 394.

(*x*) Ibid.

tempt, which is wholly pardoned: and the party must begin anew to compel a payment of the costs (*y*).

4. But it seems agreed, that a pardon shall not discharge a suit in the spiritual court, any more than in a temporal, for a matter of interest or property in the plaintiff; as for tithes, legacies, matrimonial contracts, and such like. Also it is agreed, that after costs are taxed in a suit in such court at the prosecution of the party, whether for a matter of private interest, or *pro reformatione morum* or *salute animæ*, as for defamation, or the like, they shall not be discharged by a subsequent pardon (*z*).

5. A person admitted to the benefit of clergy, is not to be deprived in the spiritual court for the crime for which he hath had his clergy. For a pardon frees the party from all subsequent punishment, and consequently from deprivation (*a*).

6. By the statute of the 20 Geo. 2, c. 52 (which is the last act of general pardon) all contempts in the ecclesiastical court in matters of correction are pardoned; but not in causes which have been commenced for matters of right.

Parish.

1. Origin of	73	3. Parishioners—their Custom to	
2. Boundaries of	75	elect certain Officers . . .	79
		4. Mandamus to Parish Officers	81

1. **AT** first there were no parochial divisions of cures here in England, as there are now (*b*). For the bishops and their clergy lived in common; and before that the number of Christians was much increased, the bishops sent out their clergy to preach to the people, as they saw occasion. But after the inhabitants had generally embraced Christianity, this itinerant and occasional going from place to place, was found very inconvenient, because of the constant offices that were to be administered, and the people not knowing to whom they should resort for spiritual offices and directions. Hereupon the bounds of parochial cures were found necessary to be settled here, by those bishops who were the great instruments of converting the nation from the Saxon idolatry. At first they made use of any old British churches that were left standing; and afterwards from time to time in successive ages, churches were built and endowed by lords of manors and others, for the use of the inhabitants of their several manors or districts, and consequently parochial bounds affixed thereunto (*c*).

First Institution of Parishes.

(*y*) 2 Haw. 394.

(*z*) Ibid.

(*a*) 2 Haw. 364.

(*b*) ["Parochial divisions, as they now exist, did not take place, at least

in some countries, till several centuries after the establishment of Christianity." — Hallam's Middle Ages, vol. ii. p. 205, 7th ed.—Ed.]

(*c*) 1 Still. 88, 89.

And it was this which gave a primary title to the patronage of laymen; and which also oftentimes made the bounds of a parish commensurate to the extent of a manor (*d*).

Many of our writers have ascribed the first institution of parishes in England to Archbishop Honorius, about the year 636; wherein they built all on the authority of Archbishop Parker. But Mr. Selden seems rightly to understand the expression *provinciam suam in parochias divisit*, of dividing his province into new *dioceses*; and this sense is justified by the author of the Defence of Pluralities. The like distinction of parishes which now obtains, could never be the model of Honorius, nor the work of any one age. Some rural churches there were, and some limits prescribed for the rights and profits of them. But the reduction of the whole country into the same formal limitations was gradually advanced, being the work of many generations. However at the first foundation of parochial churches (owing sometimes to the sole piety of the bishop, but generally to the lord of the manor) they were but few, and consequently at a great distance: so as the number of parishes depending on that of churches, the parochial bounds were at first much larger, and by degrees contracted. For as the country grew more populous, and persons more devout, several other churches were founded within the extent of the former, and then a new parochial circuit was allotted in proportion to the new church, and the manor or estate of the founder of it. Thus certainly began the increase of parishes, when one too large and diffuse for the resort of all inhabitants to the one church, was by the addition of some one or more new churches cantoned into more limited divisions. This was such an abatement to the revenue of the old churches, that complaint was made of it in the time of Edward the Confessor: "Now (say they) there be three or four churches, where in former times there was but one; and so the tithes and profits of the priest are much diminished (*e*)."

And now, the settling the bounds of parishes depends upon ancient and immemorial custom. For they have not been limited by any act of parliament, nor set forth by special commissioners; but have been established, as the circumstances of times and places and persons did happen to make them, greater or lesser (*f*).

In some places, parishes seem to interfere, when some place in the middle of another parish belongs to one that is distant; but that hath generally happened by an unity of possession, when the lord of a manor was at the charge to erect a new church, and to make a distinct parish of his own demesnes, some of which lay in the compass of another parish (*g*).

But now care is taken (or ought to be) by annual perambu-

(*d*) Ken. Impropr. 5, 6, 7.

(*e*) Ken. Par. Ant. 586, 587.

(*f*) 1 Still. 243.

(*g*) 1 Still. 244.

lations to preserve those bounds of parishes, which have been long settled by custom (*h*).

Prima facie the whole parish is bound to support its poor jointly; but a ville or township may have separate overseers of its own, under the 13 & 14 Car. 2, c. 12; and the court of King's Bench will assist such a subdivision of a parish on the ground of conveniency (*i*). The parish at large is also bound to repair all high roads lying within it, unless that burden be thrown on others by prescription or tenure; and therefore, if a parish be partly situate in one county, and partly in another, and a highway in one part be out of repair, the indictment must be against the whole parish, and not against the inhabitants of that part only in which the road lies (*k*). If the inhabitants of a township, bound by prescription to repair the roads within the township, be exempted by the provisions of an act of parliament from repairing any new roads which may be made within it, the charge will fall on the rest of the parish (*l*). Where one side of a common highway is situated in one parish, and the other side in another, two justices may determine what parts shall be repaired by each (*m*).

Parish bound to support its Poor, and repair its Roads.

2. By a constitution of Archbishop Winchelsey, the parishioners shall find at their own charge *banners for the rogations* (*n*).

Perambulation of the Boundaries of Parishes.

And upon the account of perambulations being performed in rogation week, the rogation days were anciently called *gange-days*; from the Saxon *gan* or *gangen*, to go.

M., 37 & 38 Eliz., *Goodday v. Michell* (*o*). Trespass for breaking his close, and for breaking down two gates, and three perches of hedge. The defendant justifies; for that the said close was in the parish of Rudham, and that all the parishioners there for time immemorial had used to go over the said close upon their perambulation in rogation week; and because the plaintiff stopped the two gates and obstructed three perches of hedge in the said way, the defendant, being one of the parishioners, broke them down. And by the court: It is not to be doubted but that parishioners may well justify the going over any man's land in the perambulation, according to their usage, and abate all nuisances in their way.

In the perambulation of a parish, no refreshment can be claimed by the parishioners, as due of right from any house or lands in virtue of custom. The making good such a right on that foot, hath been twice attempted in the spiritual courts; but in both cases prohibitions were granted, and the custom declared to be against law and reason (*p*).

(*h*) 1 Still. 244.

(*l*) *Rex v. The Inhabitants of Sheffield*, 2 Term Rep. 106.

(*i*) *Rex v. Inhabitants of Leigh*, 3 Term Rep. 746.

(*m*) 34 Geo. 3, c. 64.

(*k*) *Rex v. The Inhabitants of Clifton*, 5 Term Rep. 498; *contra*, *Rex v. Weston*, 4 Bur. 2507.

(*n*) Lind. 252.

(*o*) Cro. Eliz. 441.

(*p*) *Gibs.* 213; *Willy v. Harbert*, 3 Keb. 609.

These perambulations (though of great use in order to preserve the bounds of parishes) were in the times of popery accompanied with great abuses; viz. with feastings and with superstition; being performed in the nature of processions, with banners, hand bells, lights, staying at crosses, and the like. And therefore when *processions* were forbidden, the useful and innocent part of *perambulations* was retained in the injunctions of Queen Elizabeth; wherein it was required, that for the retaining of the perambulation of the circuits of parishes, the people should once in the year, at the time accustomed, with the curate and the substantial men of the parish, walk about the parishes, as they were accustomed, and at their return to the church make their common prayers. And the curate, in their said common perambulations, was at certain convenient places to admonish the people to give thanks to God (in the beholding of his benefits), and for the increase and abundance of his fruits upon the face of the earth; with the saying of the 103rd psalm. At which time also the said minister was required to inculcate these or such like sentences, *Cursed be he which translateth the bounds and dolles of his neighbour*; or such other order of prayers as should be lawfully appointed (*q*).

But the superstitions here laboured against, were not so easily suppressed; as may be gathered from the endeavours used to suppress them so late as the time of Archbishop Grindal: And now, since that hath been long effected, it were to be wished, that perambulations were held more regularly and frequently than now they are, to the end the limits of parishes may be the better kept up and ascertained (*r*).

[See Lord Denman's judgment in *Taylor v. Devey* (*s*), in which the right to enter private houses, and to remove all obstructions to such entrance, for the purpose of perambulating parochial boundaries, is said to have been long confirmed by high judicial sanction.

[But a custom for the parishioners on perambulation of the parish boundaries to go through a house which is not on the boundary line, is bad (*t*).

Church
Building
Acts.

1 & 2 Vict.
c. 106.
Provisions
for annexing
isolated
Places to the
contiguous
Parishes, or
making them
separate Be-
nefices.

[The church building acts contain particular regulations for the boundaries of parishes, formed by the assignment of districts to chapels, in compliance with the provisions which these acts prescribe (*u*). And it is provided by sect. 26 of 1 & 2 Vict. c. 106, "That when, with respect to his own diocese, it shall appear to the archbishop of the province, or when the bishop of any diocese shall represent to the said archbishop, that any such tithing, hamlet, chapelry, place, or district within the diocese of such archbishop, or the diocese of such bishop, as the case may be, may be advantageously separated from any parish or mother church, and either be constituted a separate

(*q*) Gibs. 213.

(*r*) Ibid.

(*s*) [7 Ad. & Ell. 412; 2 Nev. & Per. 472.]

(*t*) [Ibid.]

(*u*) [See Appendix.]

benefice by itself or be united to any other parish to which it may be more conveniently annexed, or to any other adjoining tithing, hamlet, chapelry, place, or district, parochial or extra-parochial, so as to form a separate parish or benefice, or that any extra-parochial place may with advantage be annexed to any parish to which it is contiguous, or be constituted a separate parish for ecclesiastical purposes; and the said archbishop or bishop shall draw up a scheme in writing (the scheme of such bishop to be transmitted to the said archbishop for his consideration), describing the mode in which it appears to him that the alteration may best be effected, and how the changes consequent on such alteration in respect to ecclesiastical jurisdiction, glebe lands, tithes, rent-charges, and other ecclesiastical dues, rates, and payments, and in respect to patronage and rights to pews, may be made with justice to all parties interested; and if the patron or patrons of the benefice or benefices to be affected by such alteration shall consent in writing under his or their hands to such scheme, or to such modification thereof as the said archbishop may approve, and the said archbishop shall, on full consideration and inquiry, be satisfied with any such scheme or modification thereof, and shall certify the same and such consent as aforesaid, by his report to her Majesty in council, it shall be lawful for her Majesty in council to make an order for carrying such scheme, or modification thereof, as the case may be, into effect; and such order, being registered in the registry of the diocese, which the registrar is hereby required to do, shall be forthwith binding on all persons whatsoever, including the incumbent or incumbents of the benefice or benefices to be affected thereby, if he or they shall have consented thereto in writing under his or their hands; but if such incumbent or incumbents shall not have so consented thereto the order shall not come into operation until the next avoidance of the benefice by the incumbent objecting to the alteration, or by the surviving incumbent objecting, if more than one shall object thereto; and in such case the order shall forthwith, after such avoidance, become binding on all persons whatsoever."—ED.]

The bounds of parishes, though coming in question in a spiritual matter, shall be tried in the temporal court. This is a maxim, in which all the books of common law are unanimous; although our provincial constitutions do mention the bounds of parishes, amongst the matters which merely belong to the Ecclesiastical Court, and cannot belong to any other (*v*). The bounds of a parish may be tried in an action at law; but a bill will not lie for an issue or commission to ascertain boundaries between two parishes: except perhaps the parishioners have a common right, as where all the tenants of a manor claim a right of common by custom, in which case the right of all is tried by trying the right of one; or where all parties concerned

Bounds of
Parishes,
where to be
tried.

are before the court (*x*); or where a commission was prayed, in the Court of Exchequer, to ascertain the bounds of a parish, upon a presumption that all the lands within it would be titheable to the parson, but denied; and where it is said, that the first mentioned decision was upon a bill brought by the parish of St. Luke, to avoid confusion in making the rates, a number of houses having been built on waste land, and it being doubtful to which parish the different parts of the waste belonged.

And in the 14 Car., when a prohibition was prayed to the Spiritual Court, for proceeding to determine a case of tithes, the right to which depended on the lands lying in this or that *vill*; it was denied by the whole Court of King's Bench, who declared, that the bounds of vills are triable in the Ecclesiastical Court (*y*). But this was between two spiritual persons, the rector and vicar (*z*).

And in the case of *Ives v. Wright*, H., 15 Car. (*a*), if the bounds of a village in a parish (*b*) come in question in the Ecclesiastical Court, in a suit between the parson impropriate and the vicar of the same parish, as if the vicar claim all the tithes within the village of D. within the parish, and the parson all the tithes in the residue of the parish, and the question between them is, whether certain lands, whereof the vicar claims the tithe, be within the village of D. or not; yet inasmuch as it is between spiritual persons, viz. between the parson and vicar, although the parson be a layman, and the parsonage appropriate a lay-fee, yet it shall be tried in the Ecclesiastical Court. And in this case the prohibition was denied.

And by the 17 Geo. 2, c. 37, s. 1, 2, it is enacted, that where there shall be any dispute, in what parish or place improved wastes and drained and improved marsh lands lie, and ought to be rated; the occupiers of such lands, or houses built thereon, tithes arising therefrom, mines therein, and saleable underwoods, shall be rated to the relief of the poor and to all other parish rates within such parish and place which lies nearest to such lands: and if on application to the officers of such parish or place to have the same assessed, any dispute shall arise, the justices of the peace at the next sessions after such application made, and after notice given to the officers of the several parishes and places adjoining to such lands, and to all others interested therein, may hear and determine the same on the appeal of any person interested, and may cause the same to be equally assessed, whose determination therein shall be

(*x*) *St. Luke, Old-Street*, v. *St. Leonard, Shoreditch*, *Atkyns v. Hatton*, 1 Anstr. 395; [1 Bro. C.C. 40.]

(*y*) *Gibs.* 213.

(*z*) 2 Rolle's Abr. 312.

(*a*) *Ibid.*

(*b*) [See *Siderfin*, 89; *Buller v. Yateman*, 1 Keble, 369; for a distinction between the bounds of vills and

of parishes. See also *Speer v. Cawter*, 2 Meriv. 410; *Atkins v. Hatton*, 2 Anstr. 386; *Wake v. Conyers*, 1 Eden, 331; *Miller v. Warmington*, 1 Jac. & Walk. 484; *Carberry v. Mansell*, Vern. & Scriv. R. 112; *Woolaston v. Wright*, 3 Anst. 801, as to commissioners for ascertaining boundaries.—Ed.]

final. But this shall not determine the boundaries of any parish or place, other than for the purpose of rating such lands to the relief of the poor, and other parochial rates.

And by the 2 & 3 Edw. 6, c. 13, s. 3, every person who shall have any beasts or other cattle tithable, depasturing in any waste or common, whereof the parish is not certainly known, shall pay the tithes thereof where the owner of the cattle dwells. [See also 41 Geo. 3, c. 109, empowering commissioners to inquire into the boundaries of parishes, &c.]

3. ["Parishioners (says Lord Hardwicke) is a very large word; it takes in not only inhabitants of the parish, but persons who are occupiers of lands, that pay the several rates and duties, though they are not resident nor do contribute to the ornaments of the church. Inhabitants is still a larger word; it takes in housekeepers, though not rated to the poor; it takes in persons also who are not housekeepers; as, for instance, such who have gained a settlement, and by that means become parishioners (c)."] The importance attached to the meaning of the word "parishioners" springs from the circumstance that many parish offices, some of a lucrative description, such as lecturers, sextons, &c., others of a merely honorary character, such as churchwardens, are elective, and in the gift of the parishioners. The election of churchwardens and lecturers are treated of under the titles **Churchwardens** and **Lecturers**, in the first and second volumes of this work. In 1825 it was alleged, in an action to a false return to a writ of mandamus, to be a custom in a parish, that whenever the perpetual curacy of St. Sepulchre in the town of Cambridge should be vacant by reason of the death of the curate or otherwise, the parishioners should elect a fit person to succeed him, and that a vacancy having occurred, the plaintiff was duly elected according to the custom. Mr. Justice Littledale said (agreeing with Holroyd and Bayley, J.) "The custom, as alleged in the declaration, is, that the parishioners should elect; all parishioners, therefore, had a right to elect; but it was decided at the meeting that no persons who had not paid the church rate should vote. Now it is possible that no church-rate may have been made for many years before, and, therefore, that a party may not have paid the rate, because there was none to be paid; but I think that the parishioners, at the time of meeting for the purpose of electing, had no right to restrict the number of electors. Corporators have the right to make reasonable by-laws, even to restrict the number of electors; but that must be done at a corporate meeting, convened for the purpose, and of which reasonable notice must be given. I will not say whether the parishioners had a right in this case, if they had given due notice of their intention, to make it a rule that no person who

Who are Parishioners.

Custom for Parishioners to elect a Perpetual Curate.

(c) [See also *Att. Gen. v. Parker*, 3 Atkyns, 577; *S.C.* 1 Ves. sen. 43, as to the distinction between house-keepers and inhabitants paying scot and lot, by the same learned judge. —Ed.]

had not paid the church-rate should have a right to vote. I am clearly of opinion that they had no right to do it on the spur of the occasion. As to the other question, it is clear that at common law, where parties have the right of voting, the restriction of voting by ballot cannot be imposed. The writing of the name of the candidate on a card is not strictly an election by ballot. The great objection to such a mode of election is, that there can be no effectual scrutiny, because if it be afterwards discovered that a given individual has voted who had no right to vote, it is impossible to say on which side he voted. I think that the mode of election adopted in this case was illegal. But it is unnecessary to decide that point. It is sufficient to say, that the plaintiff has not made out that he was elected by the parishioners. That being so, I think the rule for a new trial must be made absolute (d)."

To elect a
Sexton.

[In 1836 a mandamus was applied for on affidavits making a *prima facie* case of right in the inhabitants to elect a sexton for the parish of Stoke Damerel in Devonshire. Affidavits were filed in answer, stating facts to show that the right was in the rector, who had filled up the appointment. The office being full, a question arose as to whether the proper remedy was not by "*quo warranto*," instead of "*mandamus*." Mr. Justice Patteson (agreeing with Lord Chief Justice Denman, Williams and Coleridge, Justices, said (e), "I am of the same opinion. I cannot at present find any reported case in which a mandamus has been granted to elect, where the office was already filled by a void election; but I am sure, from my recollection, that the practice is so, if the court is satisfied of the election being void (f). In *Rex v. The Corporation of Bedford* (g), where the corporation had elected a mayor who would not attend to be sworn in, because he had not qualified, the court ultimately granted a mandamus to proceed to a new election; that, however, was after much doubt, and the office was expressly avoided by stat. 13 Car. 2, stat. 2, c. 1, s. 12. But I am confident that, if the question cannot be tried by a *quo warranto*, the course is to grant a mandamus for a new election, where the court is satisfied that the first election is void. Where there is any other mode of trying the right, a mandamus ought not to go. Here, *prima facie*, the appointment is right, being made by the rector, who, by the general law, is the proper person to make it. Strong evidence would be necessary to disprove his authority. There is, on the other hand, a custom alleged for the parishioners to elect; and some evidence, not conclusive, but amounting to a *prima facie* case, has been given, to show that the last election was by them.

(d) [*Faulkner v. Elger*, 4 Barn. & Cress. 457; 6 Dowl. & Ry. 524.]

(e) [*The King v. The Minister and Churchwardens of Stoke Damerel*, 5 Ad. & Ell. 589; 1 Nev. & Per. 453.]

(f) [It seems to have been so un-

derstood in *Rex v. The Churchwardens of St. Pancras*, 1 A. & E. 80; and see there the judgments of Parke, J., p. 100, and of Patteson, J., p. 102.]

(g) [1 East, 79.]

The office, however, is now full by the rector's appointment. If there were no other remedy, I should say that a mandamus ought to go; but there is such a remedy, by refusing the fees, or bringing an action for money had and received if they are taken. It cannot be supposed that the sexton will go on for five or six years refusing his fees, to prevent a trial of the right; at least the probability of it is not one which we can enter into. The rule must therefore be discharged (*f*)."

4. [A mandamus does not lie to admit a vestry clerk (*g*), because such office is not fixed and permanent, but dependent on the will of the inhabitants; nor to overseers (*h*) of the poor to make a rate, without first appealing to the sessions, nor to collect a rate (*i*): and although it will lie against old overseers to deliver their public books and papers to their successors, it will be refused to churchwardens to deliver a vestry-book to the vestry clerk (*k*); so it was to restore the clerk and treasurer of the poor of St. Nicholas, Rochester (*l*); but it will (*m*) be granted to commissioners entrusted by act of parliament with the regulation of the expenditure of a parish to compel them to levy a rate for the purpose of paying off a sum borrowed by former commissioners, without pledging their personal responsibility. Where a party applies for a mandamus to compel churchwardens to allow him to inspect their accounts according to the directions of 17 Geo. 2, c. 38, he must state some special reasons for which he wishes to see the accounts, and it is no answer to the application, that the statute imposes a penalty upon the churchwardens improperly so refusing the inspection (*n*). But a parishioner has no right to inspect parish books for the purpose of gaining information which may be useful to him with a view to support his claim to an estate in the parish (*o*); and though the court will not grant a mandamus to churchwardens to compel them to make a church rate, which is purely a matter of ecclesiastical jurisdiction (*p*), yet it will to the churchwardens of two parishes united under 10 Anne, c. 11, to assemble a meeting for the purpose of seeing if it be fit to be made (*q*); and to parishioners to meet with the minister for

When a Mandamus will lie to Parish Officers.

(*f*) [As to the limitation of the parishioner's right by usage, as to voting by scot and lot, as to right under deed or charter, consult *Att.-Gen. v. Newcome*, 14 Ves. 8; *Att.-Gen. v. Forster*, 10 Ves. 339; *Rex v. Osbourne*, 4 East, 329; *Rex v. Varlo*, Cowper, 250; for voting by ballot, see *Faulkner v. Edgar*, cited above, p. 65; by proxy, *Wilson v. Denison*, Ambl. 36, dicta of Lord Hardwicke.]

(*g*) [*Rex v. Churchwardens of Croydon*, 5 T. R. 713. Lord Kenyon.]

(*h*) [*Rex v. Canterbury*, 4 Burr. 2290.]

(*i*) [*Rex v. Overseers of Norwich*, Nolan, 28.]

(*k*) [*Anon.* 2 Chit. 255; *Rex v. Worcestershire*, 3 D. & R. 299; 5 B. & C. 899.]

(*l*) [*Rex v. Guardians of St. Nicholas, Rochester*, 4 M. & Selw. 324.]

(*m*) [*Rex v. Commissioners of St. Paul, Shadwell*, 1 M. & R. 591.]

(*n*) [*Rex v. Clear*, 7 D. & R. 393; 4 B. & C. 899.]

(*o*) [*Rex v. Smallpiece*, 2 Chit. 288.]

(*p*) [5 T. R. 361; 4 M. & Selw. 250.]

(*q*) [4 M. & Selw. 250; *Anon. Str.* 686; *Rex v. Wir*, 2 B. & Ad. 197.]

the purpose of electing churchwardens; and in certain cases to churchwardens to convene a general meeting of the parish to establish a select vestry (*r*). In all cases there must have been a refusal, direct or implied, by the party bound by law to do some act, before a mandamus will be granted (*s*).—ED.]

Parish Clerk (*t*).

Parish Clerk.

1. “WE do decree that the offices for holy water be conferred upon poor clerks (*u*).”

For the understanding of which constitution, it is to be observed, that parish clerks were heretofore real clerks, of whom every minister had at least one, to assist under him in the celebration of divine offices; and for his better maintenance, the profits of the office of *aquæbajalus* (who was an assistant to the minister in carrying the holy water) were annexed unto the office of the parish clerk by this constitution; so as, in after times, *aquæbajalus* was only another name for the clerk officiating under the chief minister.

His Qualification.

2. Can. 91. “And the said clerk shall be twenty years of age at the least; known to the parson, vicar, or minister to be of honest conversation, and sufficient for his reading, writing, and also for his competent skill in singing (if it may be).”

How to be appointed.

3. All incumbents once had the right of nomination of the parish clerks, by the common law and custom of the realm (*x*).

And by the aforesaid constitution of Archbishop Boniface, “Because differences do sometimes arise between rectors and vicars and their parishioners, about the conferring of such offices, we do decree, that the same rectors and vicars, whom it more particularly concerneth to know who are fit for such offices, shall endeavour to place such clerks in the aforesaid offices, who, according to their judgment, are skilled and able to serve them agreeably in the divine administration, and who will be obedient to their commands.”

And by Can. 91, “No parish clerk upon any vacation shall be chosen within the city of London or elsewhere, but by the parson or vicar; or where there is no parson or vicar, by the minister of that place for the time being; which choice shall

(*r*) [*Rex v. Churchwardens of St. Martin's-in-the-Fields*, 3 B. & Ad. 907; *Rex v. Churchwardens of St. Bartholomew the Great, London*, 2 B. & Ad. 506.]

(*s*) [*Rex v. Stoke Damerel*, 5 Ad. & Ell. 584; 1 Nev. & Per. 56; *Rex v. Archdeacon of Middlesex*, 3 Ad. & Ell. 615; 15 East, 139; see titles *Lecturer, Bishop, Curate, and Churchwardens*. For cases where,

an election having taken place, a mandamus is applied for, consult *Rex v. Octavius Mashiter*, 6 Ad. & Ell. 153, 374; 1 Nev. & Per. 56, 314; *Rex v. Minister and Churchwardens of Stoke Damerel*, 5 Ad. & Ell. 584.—ED.]

(*t*) [Called originally “*edituus*,” Ayl. Parerg. 409.—ED.]

(*u*) Boniface, Lind. 142.

(*x*) Gibs. 214.

be signified by the said minister, vicar or parson, to the parishioners the next Sunday following, in the time of divine service."

Since the making of which canon, the right of putting in the parish clerk hath often been contested between incumbents and parishioners, and prohibitions prayed, and always obtained, to the spiritual court for maintaining the authority of the canon in favour of the incumbent against the plea of custom in behalf of the parishioners (*y*). [*Vide post*, p. 88, the distinction taken by Sir G. Lee.—ED.]

Thus, E., 8 Jac. 1, *Cundict v. Plomer* (*z*). The parishioners of the parish of St. Alphage in Canterbury did prescribe to have the election of their parish clerk, and by the canon the election of the clerk is given to the vicar. It was adjudged in this case, that the prescription should be preferred before the canon, and a prohibition was awarded accordingly.

T., 21 Jac., *Jermyn's case* (*a*). Jermyn, rector of the parish of St. Katherine's in Coleman Street, and Hammond, as clerk there, sued in the spiritual court to have the said clerk established there, being placed there by the parson according to the late canon, where the parishioners disturbed him, upon a pretence of a custom to place the clerk there by the election of their vestry. And upon this surmise of a custom, the churchwardens and parishioners prayed a prohibition; and after divers motions a prohibition was granted; for they held that it was a good custom, and that the canon cannot take it away.

[Before the union of parishes in London, effected by 22 Car. 2, c. 11, there was a custom in the parish of St. M. P. for the parishioners to join with the rector in the election of a parish clerk. By that act the parish of St. M. C. was united to that of St. M. P., the church of the latter parish still remaining; and it was held that the right of election after the union continued in the inhabitants jointly with the rector; and that an appointment by the rector alone, without the concurrence of the majority of such parishioners, was void; and consequently that a person so appointed could not maintain trespass against the churchwardens, &c., for forcibly expelling him from the reading-desk of the parish church. It was not decided whether the election should be made by the rector and the inhabitants of both parishes in joint vestry assembled, or by the rector with the inhabitants of St. M. P. alone, and whether the presence of the rector at the time of the election was necessary for the validity of the appointment (*b*). The earlier Church-Building Acts, 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, enact that the clerk of every church or chapel built under these acts shall be annually

In United
Parishes.

Under Church
Building Acts.

(*y*) Gibs. 214.

(*b*) [*Hartley v. Cook*, 9 Bing. 728;

(*z*) Hughes, 275; [13 Coke, 70.] 3 M. & Scott, 230; 5 C. & P. 441.]

(*a*) Cro. Jac. 670.

appointed by the minister, but the later Church Building Acts contain no such provision. *Vide post*, p. 88, as to the stipend of such clerks.—ED.]

How to be
admitted.

4. Parish clerks, after having been duly chosen and appointed, are usually licensed by the ordinary (c); [but this does not seem to be necessary (d).—ED.]

And when they are licensed, they are sworn to obey the minister (e).

And if a parish clerk hath been used time out of mind to be chosen by the vestry, and after admitted and sworn before the archdeacon, and he refuse to swear such parish clerk so elected, but admitteth another chosen by the parson, a writ may be awarded to him commanding him to swear him (f).

And in the case of *The King v. Henchman* (g), official of the Consistory Court of the Bishop of London, a mandamus was granted to admit one Robert Trott to the office of parish clerk of Clerkenwell, being elected by the parish, it being shown that the official had usually admitted to that office.

His Salary.

5. By the aforesaid constitution of Archbishop Boniface, "If the parishioners shall maliciously withhold the accustomed alms from the *aquæbajalus*, they shall be earnestly admonished to render the same; and if need be, shall be compelled by ecclesiastical censure."

Alms.]—By which word we may understand that such clerks cannot claim any thing by way of a certain allowance or endowment by reason of their office of *aquæbajalus*: but their sustentation ought to be collected and levied according to the manner and custom of the country (h).

Accustomed Alms.]—For this custom ought to be considered according to the manner anciently observed; which also, inasmuch as it concerneth the increase of divine worship, ought not to be changed at pleasure: but hereunto the parishioners may be compelled by the bishop (i).

And custom of this kind is good and laudable, that every master of a family (for instance) on every Lord's day, give to the clerk bearing the holy water somewhat according to the exigency of his condition; and that on Christmas day he have of every house one loaf of bread, and a certain number of eggs at Easter, and in the autumn certain sheaves. Also that may be called a laudable custom, where such clerk every quarter of the year receiveth something in certain in money for his sustenance, which ought to be collected and levied in the whole parish. For such laudable custom is to be observed, and to this the parishioners ought to be compelled; for having paid

(c) Johns. 204.

(d) [*Peak v. Bourne*, Str. 942, *infra*.]

(e) Johns. 205.

(f) 2 Roll. Abr. 234; Viner, Man-

damus (H 3); 3 Bac. Abr. 531

(g) 3 Bac. Abr. 531.

(h) Lindw. 143.

(i) Ibid.

the same for so long a time, it shall be presumed that at first they voluntarily bound themselves thereunto (*k*).

Admonished.]—Not only by the ministers, but also and more especially by the ordinary of the place (*l*).

By Ecclesiastical Censure.]—Of which there are three kinds: suspension, excommunication and interdict (*m*).

And by Can. 91, "The said clerks shall have and receive their ancient wages, without fraud or diminution, either at the hands of the churchwardens, at such times as hath been accustomed, or by their own collection, according to the most ancient custom of every parish."

Ancient Wages.]—In case such customary allowance is denied, the foregoing constitution, and the practice thereupon, direct where it is to be sued for, viz. before the ordinary in his ecclesiastical court. That constitution (as we see) calls those wages *accustomed alms*: and in the register there is a consultation provided in a case of the same nature, for what the writ calls *largitio charitativa* (as being originally a free gift), which by parity of reason may be fairly extended to the present case (*n*).

But by the common law, if a parish clerk claim by custom to have a certain quantity of bread at Christmas of every inhabitant of the parish, or the like, and sue for this in the Spiritual Court, a prohibition lieth (*o*).

M., 3 Ann., *Parker v. Clarke* (*p*). The clerk of a parish libelled against the churchwardens, for so much money due to him by custom every year, and to be levied by them on the respective inhabitants in the said parish; and after sentence in the Spiritual Court, the defendants suggested for a prohibition, that there was no such custom as the plaintiff had set forth in his libel. It was objected against granting the prohibition, that it was now too late, because it was after sentence, especially since the custom was not denied; for if it had, and that court had proceeded, then and not before, it had been proper to move for a prohibition. But by Holt, Chief Justice: It is never too late to move the King's Bench for a prohibition, where the Spiritual Court had no original jurisdiction, as they had not in this case, because a clerk of a parish is neither a spiritual person, nor is this duty in demand spiritual, for it is founded on a custom, and by consequence triable at law; and therefore the clerk may have an action on the case against the churchwardens for neglecting to make a rate, and to levy it, or if it had been levied and not paid by them to the plaintiff.

H., 12 Geo. 2, *Pitts v. Evans* (*q*). A prohibition was granted to a suit in the Spiritual Court by the clerk of St. Magnus for 1s. 4d., assessed on the defendant's house at a vestry in 1672,

(*k*) Lindw. 143.

(*l*) Ibid.

(*m*) Ibid.

(*n*) Gibs. 214.

(*o*) 2 Rolle's Abr. 286.

(*p*) 6 Mod. 252; 3 Salk. 87.

(*q*) Strange, 1108; S. C. 13 Vin. Ab. 155.

to be paid to the parish clerk. For, by the court, he is a temporal officer, or if not, yet he could not sue there for such a rate; for if it is due by custom, he may maintain an *assumpsit*, if not a *quantum meruit*, or a bill in equity.

But to sue for so small a matter, either at law or in equity, seems by no means eligible, as the remedy must needs be abundantly worse than the disease. Why it might not be made recoverable before justices of the peace in like manner as small tithes, or in some other easy and expeditious method, no sufficient reason seems to have been assigned. Indeed, after all, the manner of recovering this salary, difficult as it may be, is not the greatest difficulty, for by the continual decrease in the value of money almost nothing remains to be contended for. Two-pence or three-pence, or a like diminutive sum for each house, when these salaries first became established, and for a long time after, were of more real intrinsic worth than ten times the same nominal sums at present, and are decreasing in value every day. Insomuch that unless some other course shall be taken to bring this matter back nearer to the original standard, very few persons will be found who will accept the office, and many parishes already are become entirely destitute.

How to be
removed from
his Office.

6. The parish clerk ought to be deprived by him that placed him in his office; and if he is unjustly deprived, a mandamus will lie to the churchwardens to restore him; for the law looks upon him as an officer for life, and one that hath a freehold in his place, and not as a servant, and therefore will not suffer the ecclesiastical court to deprive him, but only to correct him for any misdemeanor by ecclesiastical censures (*r*).

T., 13 Geo., *Townshend v. Thorpe* (*s*). The plaintiff declared in prohibition, that he was indicted for an assault with intent to commit sodomy, notwithstanding which he was proceeded against in the Spiritual Court for the same offence, and for drunkenness. The defendant pleaded, that the plaintiff was a parish clerk, and that the suit there was not only to punish him for the incontinency, but also to deprive him of his office. Demurrer thereupon. And as it was going to be argued, the court proposed to stay till the indictment was tried; and it having been tried, and the defendant convicted and pilloried, the court, without ordering the declaration to be amended, granted a consultation as to the proceeding to deprive, and confirmed the prohibition as to any other punishment. They said, he was an ecclesiastical officer as to every thing but his election.

M., 6 Geo. 2, *Peak v. Bourne* (*t*). The plaintiff declared in prohibition, that he was sued in the Spiritual Court for executing the office of deputy parish clerk, without the licence of the or-

(*r*) 3 Rolle's Abr. 234; Gibs. 214;
God. 192; [2 Brownl. 38.]

(*s*) Str. 776; [S. C. 2 Raym. 1507.]

(*t*) Str. 942. [This case is reported
in 2 Lee, 587.]

dinary. On demurrer, three points were made: 1. Whether a parish clerk be a temporal or a spiritual office. 2. Whether he can make a deputy. 3. Whether the licence of the ordinary is requisite. It was argued three several times upon all the points. But the court in giving judgment founded themselves only upon the last; as to which they held, that a licence was not necessary, and therefore gave judgment for the plaintiff in prohibition. They said the canon did not require it, and indeed it would be a transferring the right of appointment to all intents and purposes to the ordinary. As to the two other points, the court strongly inclined that he was a temporal officer as to the right of his office, and that he might make a deputy. And as to the first, when the court were pressed with their own authority in *Townshend v. Thorpe*, they said it was a hasty opinion, into which they were transported by the enormity of the case.

How to be removed from his Office.

[Lord Tenterden, speaking of *Townshend v. Thorpe* (u), said, "Objection has since been made to that case, on the ground that the Ecclesiastical Court had no authority to suspend or deprive, perhaps that objection is well founded." But see next page, Sir G. Lee's remarks.—ED.]

T., 30 & 31 Geo. 2, *Tarrant v. Haxby* (x). A motion was made for a prohibition to the Consistory Court of York, to stay their proceedings against Tarrant, the present parish clerk of St. Osith in York; which proceedings were there instituted at the instance of Haxby, the deprived parish clerk, for the restoration of the said Haxby. It was urged that the office is temporal, and therefore that the Spiritual Court hath no jurisdiction concerning his deprivation. This Haxby, they said, was deprived by the parson and the whole parish, for drunkenness during divine service and other misdemeanors: Whereupon the parson appointed Tarrant in his room. Against whom Haxby libelled in the Consistory Court, where there was a monition, and they were proceeding to restore Haxby. And all this was suggested. Upon which a rule was granted to show cause. And now cause was to have been shown. But the counsel, being satisfied that it was too strong against them, gave it up. And the rule for the prohibition was made absolute.

H., 16 Geo. 3, *The King v. Erasmus Warren* (y), clerk. In the last term cause was showed against a mandamus to restore William Readshaw to the office of parish clerk of Hampstead. It was stated, that the clerk was appointed by the minister; that he had since become bankrupt, and had not obtained his certificate; that he had been guilty of many omissions in his office; was actually in prison at the time of his amoval; and had appointed a deputy who was totally unfit for the office. Against which it was insisted, that the office of parish clerk is a tem-

Mandamus to restore.

(u) [*Free v. Burgoyne*, 5 Barn. & Cress. 405; 8 D. & R. 587.]

(x) Bur. Mansfield, 367.

(y) Cowper, 370.

Mandamus to
re-store.

poral office during life; that the parson cannot remove him; and that he has a right to appoint a deputy. Lord Mansfield then said, there was an application of this sort in a cause of *The King v. Proctor*, M., 15 Geo. 3, where the parson removed a parish clerk appointed by the former incumbent. There the right of amotion was in question, and all agreed it must be somewhere, but that case was not decided. Lord Mansfield asked, what remedy is there in Westminster Hall to remove him? He certainly hath his office only during his good behaviour. But though the minister may have a power of removing him on a good and sufficient cause, he can never be the sole judge and remove him at pleasure, without being subject to the control of this court. By Mr. Justice Aston: As long as the clerk behaves himself well, he has a good right and title to continue in his office. Therefore if the clergyman has any just cause for removing him, he should state it to the court. Accordingly, the court enlarged the rule to this term, that affidavits might be made on both sides, of the cause and manner of amotion. And now on this day, upon reading the affidavits, Lord Mansfield said, it was settled in the case of *The King v. Dr. Ashton*, 28 Geo. 2, that a parish clerk is a temporal officer, and that the minister must show ground for turning him out. Now in this case, there is no sufficient reason assigned in the affidavits that have been read, upon which the court can exercise their judgment, nor is there any instance produced of any misbehaviour of consequence; therefore the rule for a mandamus to restore him must be made absolute.

[A pauper was appointed a parish clerk in the following manner: The rector sent for the pauper on a Sunday, and requested him to perform duty on that day, and on coming out of the desk, the rector said to the pauper, "I appoint you my regular clerk and sexton, and to follow me in funerals and marriages (z)." It was held that this was a proper appointment of the pauper as parish clerk (a). It seems to be doubtful whether the canon renders it necessary that the appointment of a parish clerk should be signified to the parishioners. A right to demand a poll is by law incidental to the election of a parish officer by show of hands (b).

[But a mandamus does not lie to restore one to the office of deputy parish clerk (c). It has been held, as we have seen, that it lies to a minister to restore a parish clerk removed by him *without just cause*. And the court will not judge of the justice of the cause of the removal upon the *ex parte* statement of the minister; he must state it in his return to the mandamus, and give to the clerk an opportunity of answering it (d). But Sir G,

(z) [*Rex v. St. Ann's, Soho*, 3 Burr. 1877.] 558.]

(a) [*Rex v. Bobbing (Inhab.)*, 1 N. & P. 166.]

(b) [*Campbell v. Maund*, 1 N. & P.

(c) [*Anon. Lofft.* 434.]

(d) [*Rex v. Davies*, 9 D. & R. 234; and see Lord Kenyon's remarks, *Rex v. Gaskin*, 8 T. R. 209.]

Lee said that where a parish clerk was appointed by the parishioners by custom, he had been held to be a temporal officer; but where he was nominated by the parson he was a spiritual officer, and that all proceedings to deprive a clerk in the Ecclesiastical Court must be plenary and by articles (*e*).

[Serving the office of parish clerk for a year gains a settlement, although he be chosen by the parson and not by the parishioners, and have no licence from the ordinary, and although he be a certificate man (*f*).

[The Church Building Acts contain particular provisions for the assignment of a stipend to the clerk.

[The 58 Geo. 3, c. 45, enacts,

[Sect. 63. "That it shall be lawful for the said commissioners to make such orders as they shall deem expedient, as to the amount of rent to be reserved for each pew or seat in any such church or chapel; and the produce of such rents shall form a fund, out of which provision shall be made for the spiritual person appointed to serve the church or chapel, and for a clerk."

[Sect. 64. "That it shall be lawful for the said commissioners to assign out of pew rents a proper stipend to the spiritual person serving any such church or chapel, with consent of the bishop of the diocese, regard being had to the extent and population of the district assigned to the church or chapel, and the sum which may probably be necessary to enable such spiritual person to procure a residence in the district, and to all other circumstances; and the said commissioners may also assign salaries to the clerks of such churches or chapels; and if the commissioners and bishops do not agree as to the amount of any such stipend, such amount shall be settled by the archbishop of the province."

[The 59 Geo. 3, c. 134, provides by sect. 6, that commissioners may unite parts of contiguous parishes and extra-parochial places into separate districts for ecclesiastical purposes; and make loans for building chapels for the use of such districts; and constitute such district consolidated chapelries; and that—

["Every such chapelry shall be under the superintendence of such spiritual person as shall be appointed under the provisions of this act, to serve any such chapel; and such spiritual person shall have cure of souls in such district; and the right of presentation and appointment of such spiritual person shall thenceforth belong to such person or persons, and be exercised in such manner as may be agreed by the several patrons of the churches or chapels of such parishes and extra-parochial places respectively, with the approbation of the commissioners; and banns of marriage may be published, and marriages, christenings, churchings and burials may be solemnized and performed in any such chapel, immediately and at all times after the consecration thereof; and the pew rents in such chapel shall be fixed, and salaries to the minister and clerk assigned

Stipend of Clerk under Church Building Acts.

58 Geo. 3, c. 45.

Commissioners may settle Amount of Rents of Pews.

Application of Produce. Commissioners to assign Stipends to Clergymen and Clerks out of Pew Rents; by whom differences between Commissioners and Bishop as to Stipends decided.

59 Geo. 3, c. 134.

Salaries of Minister and Clerk.

(*e*) [*Barton v. Ashton*, 1 Lee, 353. See the collection of cases of older date in the note.]

(*f*) *Inter the parishes of Gatton and Milwich*, 2 Salk. 536; *Peak v. Bourne*, 2 Str. 942; 2 Sess. Cas. 182.

59 Geo. 3,
c. 134.

Fees and
Offerings.

Compensa-
tion to In-
cumbent of
contiguous
Parish, &c.

Subject to
Laws in
Force.

Clerks and
Sextons of
Divisions of
Parish may
recover their
Fees, &c.
Compensa-
tions to
Clerks and
Sextons.

1 & 2 Vict.
c. 107.

Certain No-
tices may be
served on
Patron alone
if there be no
Incumbent.

therefrom, in such manner as is directed in the said recited act or in this act concerning pew rents and salaries in separate or district parishes; and all fees and offerings which may arise and accrue within such chapelry, according to such table of fees as the commissioners shall make, with the approbation of the bishop, may be demanded, received, sued for, prosecuted, and recovered by the spiritual person having cure of souls therein, and by the clerk and sexton of such chapelries, in like manner as if every such chapelry was a distinct parish; and it shall be lawful for the said commissioners, and they are hereby required in every such case, to ascertain and make compensation, in manner directed in like cases under the said recited act, for any loss which may be sustained by the incumbent of any contiguous parish or extra-parochial place which shall form part of any such district, by reason of any fees, oblations, and offerings being transferred to the spiritual person serving any such chapel; and all such chapelries shall be deemed to be benefices, and be subject to the jurisdiction of the bishop and archdeacon within whose diocese and archdeaconry the altar of such chapel shall be locally situate, and to all the laws in force concerning presentation and appointment to benefices and churches, and lapse, and all other laws relating to the holding of benefices and churches."

[And by sect. 10. "That when any parish shall be divided under the provisions of the said recited act or this act, all fees, dues, profits, and emoluments belonging to the parish clerk or sexton respectively of any such parish, whether by prescription, usage or otherwise, which shall thereafter arise in any district or division of any parish divided under the provisions of the said recited act, shall belong to and be recoverable by the clerks and sextons respectively of each of the divisions respectively of the parish to which they shall be assigned, in like manner in every respect and after the same rate as they were before recoverable by the clerk and sexton respectively of the original parish; and it shall be lawful for the said commissioners in every such case to ascertain and make compensation, in manner directed by the said recited act in cases of compensation by reason of loss of fees, for any loss of fees, dues, profits, and emoluments, which any clerk or sexton may sustain by reason of any such division."

[And it may be as well to observe that the 1 & 2 Vict. c. 107, enacts,

[Sect. 2. "That where notices by the said last recited act are required to be sent to or served upon the patron and incumbent a notice to the patron alone shall be sufficient in those cases where, at the time such notices are required to be sent or served as aforesaid, there shall be no incumbent of the parish in which such church or chapel is built or proposed to be built and endowed under such last recited act or this act, and where such parish shall have remained without an incumbent for the space of twelve months."—Ed.]

Parochial Library—See Library.

Parson.

PARSON, *persona*, properly signifies the rector of a parish church; because during the time of his incumbency he represents the church, and in the eye of the law sustains the *person* thereof, as well in suing as in being sued, in any action touching the same (*f*).

Parson *imparsonnee* (*persona impersonata*) is he that as lawful incumbent is in actual possession of a parish church, and with whom the church is full, whether it be presentative or improperiate (*g*).

The law concerning parsons as distinct from vicars, is treated of under the title **Appropriation**.

Patriarch.

A PATRIARCH is the chief bishop over several *countries* or provinces, as an archbishop is of several dioceses, and hath several archbishops under him (*h*).

Patron, Patronage—See **Advowson**.

Peculiar (*i*).

[**“THE** peculiar jurisdictions in England and Wales with the manorial courts amount in number to nearly 300. Peculiars.

[**“These** jurisdictions are of several kinds: royal peculiars; peculiars belonging to the archbishops, bishops, deans, deans and chapters, archdeacons, prebendaries and canons, and even to rectors(*j*) and vicars; and there are also some of so anomalous a nature as scarcely to admit of accurate description. In some instances these jurisdictions extend over large tracts of country, embracing many towns and parishes, as the peculiar of the dean of Salisbury. In others, several places may be comprehended, lying at a great distance apart from each other. Again, some include only one or two parishes.

[**“The** jurisdiction to be exercised in these different courts is

(*f*) God. 185.

(*g*) 1 Inst. 300.

(*h*) God. 20, [and see preliminary remarks to title **Bishop**.—ED.]

(*i*) *Vide* God. Repert. Can. 18, 14.

(*j*) [Such as that of Hawarden in Flintshire, the rector of which parish grants marriage licences, probates of wills, &c., as Ordinary.—ED.]

not defined by any general law. It is often extremely difficult to ascertain over what description of causes the jurisdiction of any particular court operates, and much inconvenience results from this uncertainty.

[“ This variety of jurisdiction has proceeded from different causes, connected with the history of the church, which it is not necessary here to specify. The peculiars were always considered as interfering with the beneficial exercise of the authority of the bishop of the diocese, and proposals have been advanced at different times to remove the inconvenience.

[“ It was recommended by the commissioners appointed to revise the ecclesiastical laws in the reigns of Henry the Eighth and Edward the Sixth, that the power of the bishop, in matters of discipline, should extend to all places within the diocese, notwithstanding any exemptions or privileges they might enjoy.

[“ In the reign of Queen Elizabeth a suggestion was made in Convocation, or prepared for consideration there, that it should be proposed to parliament to subject peculiar and exempt sites and jurisdictions of monasteries to the diocesan. Bishop Randolph was occupied with the same design, and made it the subject of several charges to his clergy in the diocese of Oxford.

[“ In 1812, a bill for the better regulation of Ecclesiastical Courts was brought into parliament by Sir W. Scott, and having passed the House of Commons, was afterwards dropped in the House of Lords. A principal clause in that bill provided, ‘That the power of hearing and determining contested causes of ecclesiastical cognizance should be exercised only by Ecclesiastical Courts sitting under the immediate commission and authority of archbishops and bishops, and not by inferior or other Ecclesiastical Courts (k).’—ED.]

Exempt Jurisdictions in general.

Exempt jurisdictions then are so called, not because they are under no ordinary, but because they are not under the ordinary of the diocese, but have one of their own. These are therefore called peculiars and are of several sorts (l).

Royal Peculiars.

2. As first, royal peculiars, which are the king’s free chapels, and are exempt from any jurisdiction but the king’s, and therefore such may be resigned into the king’s hands as their proper ordinary, either by ancient privilege or inherent right (m).

[“ The very term peculiar, *ex vi termini*, supposes an exemption from ordinary jurisdiction. And Ayliffe, in his *Parergon Juris*, heads his chapter ‘Of Peculiars or Exempt Jurisdictions’, as if these were synonymous terms. He goes on to say, ‘peculiars are called exempt jurisdictions, not because they are under no ordinary, but because they are not under the ordinary of the diocese, but have one of their own.’ And so Gibson in his *Codex*, and Godolphin also, though

(k) [Rep. Eccles. Com. 21, 22.]

(l) 1 Still. 336.

(m) 1 Still. 337; Lindw. 125.

they treat the subject more at large, draw the same conclusion. There are, however, different sorts of peculiars; and they have different rights belonging to them, which must be regulated either by the nature of the peculiar itself, or by ancient usage. There are some more highly exempt than others, I mean royal peculiars; which were anciently exempt from the jurisdiction not only of the diocesan, but of the Archbishop also, and which were immediately subordinate to the see of Rome. By the statute of King Henry the Eighth, as already stated, these were placed immediately under the jurisdiction of the crown; and all appeals from them lie directly to his majesty in the High Court of Delegates. But the more common sort of peculiars are those in which the bishop has no concurrency of jurisdiction, and are exempt from his visitation. These have their appeals directly to the archbishop, and not to the diocesan, within the circle of whose diocese they are locally situated. There is a third description of peculiars which are still subject to the bishop's visitation; and, being so, are still liable to his superintendence and jurisdiction. Wood, in his Institute, mentions these. He says, 'these the bishop visits at his first and at his triennial visitations.' Here the appeal lies from the peculiar to the diocesan: but the right of appeal and the right of visitation seem almost necessarily to go together. And in a case that has been quoted in argument (*n*), Lord Chief Justice Holt said, 'that there were three sorts of peculiars: the first, royal peculiars, where the appeal is directed to the king; the second, peculiars having exempt jurisdiction, such as that of a dean and chapter; and the third, where the jurisdiction is not exempt, but under the control of the diocesan (*o*).'—ED.]

[The process (*p*) of the Prerogative Court does not run into a royal peculiar, but must be served by letters of request. And if a man (*q*) have goods in two royal peculiars, in one of which he died, and other goods in one diocese only within the province, his will is rightly proved in the royal peculiar where he died; for such peculiar is in no degree subject to the archbishop, but as independent of him in point of jurisdiction as the province of York or of Dublin. It is co-ordinate with the Prerogative Court, and the appeal from it lies to the Judicial Committee of the Privy Council.—ED.]

3. Peculiars of the archbishops, exclusive of the bishops and archdeacons; which sprung from a privilege they had, to enjoy jurisdiction in such places where their seats and possessions were: and this was a privilege no way unfit or unreasonable, where their palaces were, and they oftentimes repaired to

Archbishops' Peculiars.

(*n*) [*Johnson v. Lee*, Skin. R. 589.] 758, note.]

(*o*) [*Parham v. Templar*, 3 Phill. 245.]

(*q*) [*Smith v. Smith and others*, 3 Hagg. 763. *Miller v. Bloomfield*

(*p*) [*Crowley v. Crowley*, 3 Hagg. and *Slade*, 1 Add. 499.]

them in person, as anciently the archbishops appear to have done, by the multitude of letters dated from their several seats (*r*).

In these peculiars (which, within the province of Canterbury, amount to more than a hundred, in the several dioceses of London, Winchester, Rochester, Lincoln, Norwich, Oxford, and Chichester) jurisdiction is administered by several commissaries; the chief of whom is the Dean of the Arches, for the thirteen peculiars within the city of London. And of these Lindwood(*s*) observes, that their jurisdiction is archidiaconal(*t*).

[“A peculiar, in the ecclesiastical acceptation of the term, is a district exempt from the jurisdiction of the ordinary of the diocese. The peculiars of the archbishops had their origin from the privileged jurisdiction which they exercised in those places where the archiepiscopal palaces and possessions were situated. Within the province of Canterbury there are more than a hundred peculiars: but the term, κατ' ἐξοχην, is applied to thirteen parishes within the city of London, and the several parishes composing the deanries of Croydon in Surrey, and Shoreham in Kent, of these the Dean of Arches is judge. In the other peculiars, the jurisdiction is exercised by commissaries; from whose sentence an appeal lies to the Court of Arches (*u*).”

Peculiars of
Bishops in
another
Diocese.

4. Peculiars of bishops, exclusive of the jurisdiction of the bishop of the diocese in which they are situated. Of which sort, the bishop of London hath four parishes within the diocese of Lincoln; and every bishop who hath a house in the diocese of another bishop may therein exercise episcopal jurisdiction. And therefore Lindwood(*x*) says, the signification of *bishopric* is larger than that of *diocese*, because a bishopric may extend into the diocese of another bishop, by reason of a peculiar jurisdiction which the bishop of another diocese may have therein (*y*).

Peculiars of
Bishops in
their own
Diocese, ex-
clusive of
Archidiaconal
Jurisdiction.

5. Peculiars of bishops in their own diocese, exclusive of archidiaconal jurisdiction. Of which Lindwood (*z*) writes thus: There are some churches, which although they be situate within the precincts of an archdeaconry, yet are not subject to the archdeacon; such as churches regular of monks, canons and other religious; so also if the archbishop hath reserved specially any churches to his own jurisdiction, so as that within the same the archdeacon shall exercise no jurisdiction, as it is in many places, where the archbishops and bishops do exercise an immediate and peculiar jurisdiction (*a*).

As to the former of these, the jurisdiction over religious houses, the archdeacons were excluded from that by the an-

(*r*) Gibs. 978. Vide Godolph. Re- 201, note (*a*).]
pert. Canon. 13, 14.

(*s*) P. 79.

(*t*) Gibs. 978.

(*u*) [*Aughtie v. Aughtie*, 1 Phill.

(*x*) P. 318.

(*y*) Gibs. 978.

(*z*) P. 220.

(*a*) Gibs. 978.

cient canon law, which determines, that archdeacons shall have no jurisdiction in monasteries, but only by general or special custom; and if the archdeacon could not make out such custom, he was to be excluded from jurisdiction, because he could not claim any authority of common right. As to the other, namely, the exempting of particular parishes from archidiaconal jurisdiction, there are not only many instances of such exemptions in the ecclesiastical records, but the parishes themselves continue so exempt, and remain under the immediate jurisdiction of the archbishop, as in other places of the bishop (*b*).

6. Peculiars of deans, deans and chapters, prebendaries, and the like; which are places wherein by ancient compositions the bishops have parted with their jurisdiction as ordinaries to those societies, probably because the possessions of the respective corporations, whether sole or aggregate, lay chiefly in those places; the right of which societies was not original, but derived from the bishop, and where the compositions are lost, it depends upon prescription (*c*).

Of Deans,
Prebendaries,
and
others.

M., 8 W., *Robinson v. Godsalve* (*d*). Upon motion for a prohibition to stay a suit in the bishop's court, upon suggestion that the party lived within a peculiar archdeaconry, it was resolved by the court, that where the archdeacon hath a peculiar jurisdiction, he is totally exempt from the power of the bishop, and the bishop cannot enter there and hold court; and in such case, if the party who lives within the peculiar be sued in the bishop's court, a prohibition shall be granted: but if the archdeacon hath not a peculiar, then the bishop and he have concurrent jurisdiction, and the party may commence his suit either in the archdeacon's court or the bishop's, and he hath election to choose which he pleaseth; and if he commence in the bishop's court no prohibition shall be granted; for if it should, it would confine the bishop's court to determine nothing but appeals, and render it incapable of having any causes originally commenced there.

It seems to be true doctrine, that no exemption granted to persons or bodies under the degree of bishops, extend to a power of employing any bishop they can procure, to perform for them such acts as are merely episcopal, unless special words be found in their grants of exemption, empowering and warranting them so to do, but that all such acts are to be performed by the bishop of the diocese within which they are situated, after the exemption as much as before: or, in other words, that the exemptions in which no such clause is found, are only exemptions from the exercise of such powers, as the persons or bodies are *capable* of exercising. Thus it is in granting letters dimissory (as hath been showed before, in the title *Ordination*). And thus it seems to have been under-

(*b*) Gibs. 978.

(*d*) 1 L. Raym. 123.

(*c*) Gibs. 978; 1 Still. 337.

stood in the act of consecrating churches and churchyards, and reconciling them when polluted, by a licence which we find the Dean of Windsor had from the guardian of the spiritualties of Salisbury, to employ any catholic bishop to reconcile the cloister and yard of the said free chapel, when they had been polluted by the shedding of blood (e).

In the time of Archbishop Winchelsey, upon an appeal to Rome in a controversy concerning Pagham, a peculiar of the Archbishop of Canterbury, it was said, in the representation to the pope to be of Canterbury *diocese*; which was objected against in the exceptions on the other side, because in truth and notoriety it is in the diocese of Chichester. Which was a just exception in point of form; because the proper style of those peculiars, as often as they are mentioned in any instrument, is, *of or in such a diocese* (namely, the diocese in which they are situated), *and of the peculiar and immediate jurisdiction of the archbishop* (f).

[It is said in the judgment of Sir John Nicholl in *Parham v. Templar*, where, in deciding the question as to whether the appeal from the peculiar of the dean and chapter of Exeter lay to the diocesan or the metropolitan, the whole law upon the subject of peculiars underwent a learned investigation, and which has been already cited—"Deans and chapters are of two descriptions,—the one of the old form, and which grew principally out of papal usurpations, the other those which were erected by the crown, in the reign of Henry the Eighth, upon the dissolution of the monasteries and religious houses.—Each of these have generally some parishes under their peculiar jurisdiction:" and again, "The bishop and the dean and chapter, in some respects, within their respective jurisdictions are held to be co-ordinate. This may be inferred, in some degree, from the one hundred and fifty-sixth canon, which recites 'That whereas deans, archdeacons, and others, exercising peculiar jurisdiction within certain dioceses, claim liberty to prove the last wills and testaments of persons deceased within their several jurisdictions, but who have no public nor known place of registry for the same; such possessors of peculiar jurisdiction shall, once in every year, exhibit such original testaments in the registry of the bishop, or of the dean and chapter under whose jurisdiction the said peculiars are, &c.' Here the canon, while it refers to the jurisdiction of the bishop, at the same time recognizes the peculiar jurisdiction of the dean and chapter. This tends to prove that they are to a degree co-ordinate, and not that the bishop has jurisdiction over the dean and chapter. So again in cases of wills and administrations, where there are '*bona notabilia*,' peculiars are considered as separate jurisdictions, and not as being part of the diocese. For if there be '*bona notabilia*'

(e) Gibs. 978.

(f) Gibs. 979.

in a diocese, under the ordinary jurisdiction of the bishop, and also in a peculiar in that diocese, or in two peculiars situated in the same diocese, in such case the probate belongs to the archbishop. It is expressly so laid down by Gibson, Swinburne, and in a case in *Siderfin*; and it is declared by those authorities that in such case probate shall be granted, not by the diocesan, but by the archbishop, because such peculiars are exempt from the jurisdiction of the diocesan. Therefore, if upon '*bona notabilia*' being so circumstanced the probate is to be granted by the metropolitan, and not by the bishop of the diocese, nothing can more strongly infer that peculiars are exempt from the jurisdiction of the latter. And my Lord Holt, in a case which is in 6 Mod. Rep. lays down pretty much the same position. That is an anonymous case, but from the similarity of the subject and the wording, it appears to me to be the same case as that already referred to of *Johnson v. Ley (a)*. Here a prohibition was applied for upon several points: but on the third point Lord Holt says, 'all peculiars are not under the ordinary of the diocese in which they lie, and such as are not, cannot transmit any cause to that ordinary; such transmission must be always to the immediate superior. The dean and chapter of Salisbury have a large peculiar within the diocese of Salisbury; but as much out of the jurisdiction of the diocese of Salisbury as the diocese of London is. The peculiar jurisdiction of an archdeacon is not properly a peculiar, but rather a subordinate jurisdiction. A peculiar *primâ facie* is to be understood of him who has a co-ordinate jurisdiction with a bishop.' The general result of this is that a peculiar is not subordinate to, but co-ordinate with the jurisdiction of a bishop. There is another case in Modern Reports in which it is still more directly and broadly laid down that appeals from peculiars go, not to the diocesan but to the archbishop. The case is in the 11 Mod. Rep. p. 6. 'If sentence be given in a peculiar, the appeal therefrom is not to the diocesan but to the archbishop.' This, therefore, directly intimates the general rule of our law to be, that these appeals shall not travel to the bishop but to the metropolitan (b)."

[The twenty-ninth and thirty-sixth sections of 3 & 4 Vict. c. 113, commonly called the Church Revenue Act, have almost entirely swept away the peculiars of the dean and chapter of Westminster, and entirely that of the collegiate church of Southwell. Two parishes are still left under the jurisdiction of the former. This act furnishes the first instance of an indirect abolition of independent jurisdictions by clauses inserted into a statute, which did not profess to have any such object. A recent decision of the Consistorial Court of London has however established that such is the effect of these clauses. For this act, see *Deans and Chapters*.

(a) [Skin. 589.]

(b) [3 Phill. 245.]

[It has been shown that all donatives which have received Queen Anne's Bounty, are by 1 Geo. 2, c. 10, subjected to the jurisdiction of the diocesan. See *Donative*.

[The following clauses of 1 & 2 Vict. c. 106, should also be mentioned in this place.

Power of
Archbishops
and Bishops
as to exempt
or peculiar
Benefices, &c.

[Sect. 108. "That every archbishop and bishop within the limits of whose province or diocese respectively any benefice, exempt or peculiar, shall be locally situate, shall, except as herein otherwise provided, have, use and exercise all the powers and authorities necessary for the due execution by them respectively of the provisions and purposes of this act, and for enforcing the same with regard thereto respectively, as such archbishop and bishop respectively, would have used and exercised if the same were not exempt or peculiar, but were subject in all respects to the jurisdiction of such archbishop or bishop; and where any benefice, exempt or peculiar, shall be locally situate within the limits of more than one province or diocese, or where the same or any of them shall be locally situate between the limits of the two provinces, or between the limits of any two or more dioceses, the archbishop or bishop of the cathedral church to whose province or diocese the parish church of the same respectively shall be nearest in local situation, shall have, use and exercise all the powers and authorities which are necessary for the due execution of the provisions of this act, and enforcing the same, with regard thereto respectively, as such archbishop or bishop could have used if the same were not exempt or peculiar, but were subject in all respects to the jurisdiction of such archbishop or bishop respectively, and the same for all the purposes of this act shall be deemed and taken to be within the limits of the province or diocese of such archbishop or bishop; provided that the peculiars belonging to any archbishopric or bishopric, though locally situate in another diocese, shall continue subject to the archbishop or bishop to whom they belong, as well for the purposes of this act as for all other purposes of ecclesiastical jurisdiction."

Where Jurisdiction is
given to
Bishop, &c.,
all concurrent
Jurisdiction
to cease.

[Sect. 109. "That in every case in which jurisdiction is given to the bishop of the diocese or to any archbishop, under the provisions of this act, and for the purposes thereof, and the enforcing the due execution of the provisions thereof, all other and concurrent jurisdiction in respect thereof shall, except as herein otherwise provided, wholly cease, and no other jurisdiction in relation to the provisions of this act shall be used, exercised, or enforced, save and except such jurisdiction of the bishop and archbishop under this act; any thing in any act or acts of parliament, or law or laws, or usage or custom to the contrary notwithstanding."—ED.]

Of Monas-
teries.

7. Peculiars belonging to monasteries; concerning which, it is enacted by the 31 Hen. 8, c. 13, s. 23, "that such of the late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friars, and other religious and ecclesiastical houses and places, and all churches and chapels to them belonging, which before the dissolution were exempted from the visitation and other jurisdiction of the ordinary, shall from henceforth be within the jurisdiction and visitation of the ordinary, within whose diocese they are situate, or within the

jurisdiction and visitation of such persons as by the king shall be limited and appointed."

Such exemptions were commonly granted at Rome, to those who solicited for them, especially to the larger monasteries, and such who had wealth enough to solicit powerfully: but the right of visitation being of common right in the bishop, the religious who had obtained such exemptions were liable to be cited, and were bound, upon pain of contumacy, either to submit to his visitation, or to exhibit their bulls of exemption, to the end they might be viewed and examined and the bishop might see of what authority and extent they were. And whereas this statute vests a power in the king to subject any of those religious houses, which were heretofore made exempt, to such jurisdiction as he should appoint, exclusive of the ordinary, there can be no doubt but that the persons who claim an exemption from the visitation of the ordinary, in virtue of such appointment, are obliged upon pain of ecclesiastical censures (in like manner as the religious were) to submit the evidences of their exemption to the examination of the ordinary, without which it is impossible for him to know how far his authority extends (*g*).

8. By the 25 Hen. 8, c. 19, s. 6, "All appeals to be had from places exempt, which heretofore, by reason of grants or liberties of such places exempt, were to the bishop or see of Rome, shall be to the king in chancery, which shall be definitely determined by authority of the king's commission; so that no archbishop or bishop shall intermit or meddle with any such appeals, otherwise than they might have done before the making of this act."

Appeal from
Places
exempt.

9. By the 25 Hen. 8, c. 21, "Visitations of places exempt, which heretofore were visited by the pope, shall not be by the Archbishop of Canterbury, but in such cases, redress, visitation, and confirmation shall be by the king, by commission under the great seal."

Visitation of
Places
exempt.

And by the statute of the 1 Geo. 1, stat. 2, c. 10, "All donatives which have received or shall receive the augmentation of the governors of Queen Anne's Bounty, shall thereby and from thenceforth become subject to the jurisdiction of the bishop of the diocese; and that no prejudice may thereby arise to the patrons of such donatives, it is provided, that no such donative shall be so augmented without consent of the patron under his hand and seal."

By the 43 Geo. 3, c. 84, s. 38, "All and every the clauses, provisions, penalties and forfeitures, in this act contained, in relation to residence or to any other matters and things relating thereto, shall extend, and be deemed and construed to extend, to all dignities, prebends, benefices, donatives, perpetual curacies, and all parochial chapelries, exempt as well as

(*g*) Gibs. 977.

not exempt, *and all peculiars*, as fully and amply to all intents and purposes, as if the same had been and were therein particularly specified, any thing in any acts or laws to the contrary thereof in any wise notwithstanding."

Sect. 39. "And every archbishop, bishop and archdeacon, within the limits of whose province, diocese or jurisdiction respectively, any dignity, benefice, donative, perpetual curacy, or parochial chapel, respectively, *exempt or peculiar*, shall be locally situate, shall have the same powers and authorities, necessary for the due execution by them respectively of the provisions and purposes of this act, and for enforcing the same with regard thereto respectively, as such archbishop, bishop, and archdeacon respectively, would have used and exercised, if the same were not exempt or peculiar, but were in all respects subject to the jurisdiction of such archbishop, bishop or archdeacon; and also, where any benefice, donative, perpetual curacy, or parochial chapelry, *exempt or peculiar*, shall be locally situate within the limits of more than one province, diocese or jurisdiction, or where the same or any of them shall be locally situate between the limits of any two or more of such provinces, dioceses or jurisdictions, or any of them, the archbishop or bishop to the cathedral church, of whose province or diocese the parish church of the same shall be nearest in respect of local situation, shall have, use and exercise all the powers and authorities which are necessary for the due execution of the provisions of this act, and enforcing the same with regard thereto respectively, as such archbishop or bishop could have used, if the same were not exempt or peculiar, but were subject in all respects to the jurisdiction of such archbishop or bishop respectively; and the same, for all the purposes of this act, shall be deemed and taken to be within the limits of the province or diocese of such archbishop or bishop. And the same shall also, for the purposes of this act, be taken to be within the archdeaconry of, and subject to the jurisdiction of such archdeacon as hath jurisdiction as such over the parish, the parish church of which is nearest to the church of such benefice, donative, perpetual curacy, or parochial chapelry, any thing in any act or acts, law or laws, usage or usages, or other matter or thing to the contrary notwithstanding. Provided that the *peculiar or peculiars*, belonging to any archbishopric or bishopric, though locally situated in another diocese, shall continue subject to the archbishop or bishop to whom they belong, as well for the purposes of this act, as for all other purposes of ecclesiastical jurisdiction in the law whatsoever."

[The twenty-first section of 6 & 7 Will. 4, c. 77 (see Appendix), excepts peculiars belonging to either of the archbishops from its provisions: but by 1 & 2 Vict. c. 106, s. 108, 109, no peculiars are exempted from the operation of this act; which see under title *Plurality*.—ED.]

Penance.

1. **PENANCE** is an ecclesiastical punishment, used in the discipline of the church, which doth affect the body of the penitent; by which he is obliged to give a public satisfaction to the church for the scandal he hath given by his evil example. So in the primitive times, they were to give testimonies of their reformation, before they were readmitted to partake of the mysteries of the church. In the case of incest, or incontinency, the sinner is usually enjoined to do a public penance in the cathedral or parish church, or public market, barelegged and bareheaded in a white sheet, and to make an open confession of his crime in a prescribed form of words; which is augmented or moderated according to the quality of the fault, and the discretion of the judge. So in smaller faults and scandals, a public satisfaction or penance, as the judge shall decree, is to be made before the minister, churchwardens, or some of the parishioners, respect being had to the quality of the offence, and circumstances of the fact; as in the case of defamation, or laying violent hands on a minister, or the like (*h*).

Of Penance
and Commu-
tation in
general.

And as these censures may be moderated by the judge's discretion, according to the nature of the offence; so also they may be totally altered by a commutation of penance: and this hath been the ancient privilege of the ecclesiastical judge, to admit that an oblation of a sum of money for pious uses shall be accepted in satisfaction of public penance (*i*).

But penance must be first enjoined, before there can be a commutation; or otherwise it is a commutation for nothing (*k*).

2. Lindwood and other canonists mention three sorts of penance: Divers Kinds
of Penance.

(1). Private—enjoined by any priest in hearing confessions.

(2). Public—enjoined by the priest for any notorious crime, either with or without the bishop's licence according to the custom of the country.

(3). Solemn penance—concerning which it is ordained by a constitution of Archbishop Peccham as followeth: "Whereas, according to the sacred canons, greater sins, such as incest and the like, which by their scandal raise a clamour in the whole city, are to be chastised with solemn penance; yet such penance seemeth to be buried in oblivion by the negligence of some, and the boldness of such criminals is thereby increased; we do ordain, that such solemn penance be for the future imposed, according to the canonical sanctions (*l*)."

And this penance could be enjoined by the bishop only; and did continue for two, three, or more years. But in latter

(*h*) God. Append. 18.

(*i*) Ibid. 19.

(*k*) God. 89.

(*l*) Lindw. 339.

ages, for how many years soever this penance was inflicted, it was performed in Lent only. At the beginning of every Lent, during these years, the offender was formally turned out of the church; the first year, by the bishop; the following year by the bishop or priest. On every Maundy Thursday, the offender was reconciled and absolved, and received the sacrament on Easter-day, and on any other day till Low Sunday: this was done either by the bishop or priest. But the last final reconciliation or absolution could be passed regularly by none but the bishop. And it is observable, that even down to Lindwood's time, there was a notion prevalent, that this solemn penance could be done but once. If any man relapsed after such penance, he was to be thrust into a monastery, or was not owned by the church; or however ought not to be owned according to the strictness of the canon: though there is reason to apprehend that it was often otherwise in fact. And indeed this solemn penance was so rare in those days, that all which hath been said on this subject was rather theory than practice, except perhaps in case of heresy (*m*).

Penance may
be remitted.

[Where a party has been convicted of incest, penance has been (*n*) remitted where it was shown that the health of the party ordered to perform it would have been endangered thereby, and where the promoter expressed his concurrence with the prayer for such remission. Lord Stowell said, "In the older canons, which perhaps can hardly be said as carrying with them all their first authority, a *solennis penitentia* is enjoined before the bishop of the diocese. This however, as I have just remarked, is now softened down. Attending then to what I think is the most material point, the removing of such a scandal, and looking to the age and infirmity of the party, and what might be the consequence of such a punishment, the court will not think it necessary to inflict the public penance; but condemn him in the *full* costs of this prosecution, accompanying this with the injunction that the same intercourse must not continue, but must be *bonâ fide* and substantially removed." This, like the preceding instance, was the case of a party proceeded against for incest. But where the penance enjoined for defamation has been to acknowledge the defamation and ask for the forgiveness of the party defamed in the vestry room before the clergyman and churchwardens, the exact form of retractation of the defamatory words enjoined by the court has been compelled by the court (*o*).—ED.]

By Canon.

3. "We do ordain, that laymen shall be compelled by the sentence of excommunication to submit to canonical penances,

(*m*) Johns. Pecch.

(*n*) [*Chick v. Ramsdale*, 1 Curteis, 36; *Burgess v. Burgess*, 1 Consist. 393.]

(*o*) [*Courtail v. Homfray*, 2 Hagg. 1; *Thorp v. Brider*, 2 Phill. 359; *Cleaver v. Woodridge*, 2 Phill. 362, note.]

as well corporal as pecuniary, inflicted on them by their prelates. And they who hinder the same from being performed, shall be coerced by the sentences of interdict and excommunication. And if distresses shall be made on the prelates upon this account, the distrainers shall be proceeded against by the like penalties (*p*)."

Which corporal penances Lindwood specifieth in divers instances; as thrusting them into a monastery, branding, fustigation, imprisonment (*q*).

"We do decree, that the archdeacons for any mortal and notorious crime, or from whence scandal may arise, shall not take money for the same of the offenders, but shall inflict upon them condign punishment (*r*)."

"Because the offender hath no dread of his fault, when money buys off the punishment: and the archdeacons, and their officials, and some that are their superiors, when their subjects of the clergy or laity commit relapses into adultery, fornication, or other notorious excesses, do for the sake of money remit that corporal penance, which should be inflicted for a terror to others; and they who receive the money apply to the use of themselves, and not of the poor, or to pious uses; which is the occasion of grievous scandal, and ill example: Therefore we do ordain, that no money be in any wise received for notorious sin, in case the offender hath relapsed more than twice; on pain of restoring double of what shall have been so received within one month after the receipt thereof, to be applied to the fabric of the cathedral church; and of suspension *ab officio*, which they who receive the same, and do not restore double thereof within one month as aforesaid, shall *ipso facto* incur. And in commutations of corporal penances for money, (which we forbid to be made without great and urgent cause,) the ordinaries of the places shall use so much moderation, as not to lay such grievous and excessive public corporal penances on offenders, as indirectly to force them to redeem the same with a large sum of money. But such commutations, when they shall hereafter be thought fit to be made, shall be so modest, that the receiver be not thought rapacious, nor the payer too much aggrieved; under the penalties before mentioned (*s*)."

4. By the statute of *Circumspectè agatis*, 13 Edw. 1, st. 4, By Statute. the king to his judges sendeth greeting: "Use yourselves circumspectly concerning the bishops and their clergy, not punishing them if they hold plea in court christian of such things as be merely spiritual, that is to wit, of penance enjoined by prelates for deadly sin, as fornication, adultery, and such like; for the which sometimes corporal penance, and

(*p*) Boniface, Lindw. 321.

(*q*) Ibid.

(*r*) Othob. Athon, 125.

(*s*) Stratford, Lindw. 323.

sometimes pecuniary is enjoined (*t*): in which cases the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."

By the statute of *Articuli Cleri*, 9 Edw. 2, st. 1, c. 2, if a prelate enjoin a penance pecuniary to a man for his offence, and it be demanded, the king's prohibition shall hold place: but if prelates enjoin a penance corporal, and they which be so punished will redeem upon their own accord such penances by money; if money be demanded before a spiritual judge, the king's prohibition shall hold no place.

And by the same statute, c. 3, if any lay violent hands on a clerk, the amends for the peace broken shall be before the king, and for the excommunication before a prelate, that corporal penance may be enjoined; which if the offender will redeem of his own good will, by giving money to the prelate, or to the party grieved, it shall be required before the prelate, and the king's prohibition shall not lie.

Before the Prelate.—It seems to be agreed by the canonists, that *archdeacons* may not inflict pecuniary penalties, unless warranted by prescription (*u*).

Schedule of
Penance
must be given
to the Party.

[Where a writ *de contumace capiendo*, issued under the 53 Geo. 3, c. 127, expressed "that the defendant had been pronounced guilty of contumacy and contempt of the law and jurisdiction ecclesiastical in not having obeyed a decree made upon him to perform the usual penance in the parish church of St. M. N. in a certain cause of defamation," and it appeared that at the time the sentence was pronounced a schedule of penance was made out, but which, by the practice of the Ecclesiastical Court, could not be delivered to the defendant until he paid the costs of the suit: it was held that he ought to have had the decree exhibited to him in its more perfect form before he could be considered as being in contempt, especially as the costs were not mentioned in the *significavit*, and that he was consequently entitled to be discharged (*x*). But where an application was made to set aside a writ *de contumace capiendo* on the ground that the defendant had not been admonished to take out a schedule of penance, and that he was sentenced to perform penance in the minister's house, which he had no right to enter—it appearing, nevertheless, that there was an order for the party to pay costs, for the not doing which he was in contempt, and for which in fact the *significavit* had issued—the application was rejected, for the sentence awarded payment of a precise sum, 25*l.* costs; and if the proceedings of the court had been, as was suggested, defective, the costs would not be thereby decreased (*y*).—ED.]

Party in
contempt for
non-payment
of Costs.

(*t*) [*Dr. Barker's case* and *Mr. Auditor Jones, Register in Camera Stellatá*,] 2 Roll. Rep. 384.

(*u*) *Gibs.* 1046.

(*x*) [*Rex v. Maby*, 3 D. & R. 570; per Lord Tenterden.]

(*y*) [*Kington v. Hack*, 7 Ad. & Ell. 708, per Lord Denman; S. C. 3 Nev. & Per. 6.]

5. Dr. Ayliffe says, that anciently the commutation money was to be applied to the use of the church, as fines in cases of civil punishment are converted to the use of the public (z). Disposal of
the Commu-
tation Money.

By several of the canons made in the time of Queen Elizabeth, and in the year 1640, it was to be applied to pious and charitable uses; and the *Reformatio Legum* directed that it should be to the use of the poor of the parish where the offence was committed or the offender dwelled. And there was to be no commutation at all but for very weighty reasons and in cases very particular. And when commutation was made, it was to be with the privity and advice of the bishop. In Archbishop Whitgift's register we find that the commutation of penance without the bishop's privity was complained of in parliament. And it was one of King William's injunctions, that commutation be not made but by the express order and direction of the bishop himself declared in open court. And by the canons of 1640, if in any case the chancellor, commissary, or official should commute penance without the privity of the bishop, he was at least to give a just account yearly to the bishop of all commutation money in that year, on pain of one year's suspension (a).

In the reign of Queen Anne this matter was taken into consideration by the convocation, who made the following regulations, viz. That no commutation of penance be hereafter accepted or allowed of by any ecclesiastical judge, without an express consent given in writing by the bishop of the diocese or other ordinary having exempt jurisdiction, or by some person or persons to be especially deputed by them for that purpose; and that all commutations, or pretended commutations, accepted or allowed otherwise than is hereby directed, be *ipso facto* null and void. And that no sum of money given or received for any commutation of penance, or any part thereof, shall be disposed of to any use without the like consent and direction in writing of the bishop or other ordinary having exempt jurisdiction, if the cause hath been prosecuted in their courts; or of the archdeacon if the cause hath been prosecuted in this court. And all money received for commutation pursuant to the foregoing directions, shall be disposed of to pious and charitable uses by the respective ordinaries above named: whereof at the least one-third part shall by them be disposed of in the parish where the offenders dwell: and that a register be kept in every ecclesiastical court, of all such commutations, and of the particular uses to which such money hath been applied: and that the account so registered be every year laid before the bishop or other ordinary exempt having episcopal jurisdiction, in order to be audited by them: and that any ecclesiastical judge or officer

(z) Ayl. Par. 413.

(a) Gibs. 1045.

offending in any of the premises, be suspended for three months for the said offence (b).

But as none of these regulations are now in force, nor any of the said canons made in the time of Queen Elizabeth and in the year 1640, Mr. Oughton says generally, that commutation money is to be given to the poor where the offence was committed, or applied to other pious uses *at the discretion of the judge* (c).

About the year 1735, the Bishop of Chester cited his chancellor to the archbishop's court at York, to exhibit an account of the money received for commutations, and to show cause why an inhibition should not go against him, that for the future he should not presume to dispose of any sum or sums received on that account without the consent of the bishop. In obedience to this, an account was exhibited without oath; and that being objected to, a fuller was exhibited upon oath. And upon the hearing several of the sums in the last account were objected to as not allowable, and an inhibition prayed to the effect above. But the archbishop's chancellor refused to grant such inhibition, and was of opinion that the bishop could only oblige an account: and so dismissed the chancellor without costs.

[See titles *Excommunication*, *Church (brawling in)*, *Practice*.]

Pension.

PENSIONS are certain sums of money paid to clergymen in lieu of tithes: and some churches have settled on them annuities or pensions payable by other churches.

Thus in the *Registrum Honoris de Richmond* (d), we find a pension paid out of Coram or Coverham Abbey, in the county of York (unto which the church of Sedburgh was appropriated) to the prior of Connyside (unto whose priory the church of Orton was appropriated), for the said church of Sedburgh, 20s.

These pensions are due by virtue of some decree made by an ecclesiastical judge upon a controversy for tithes, by which the tithes have been decreed to be enjoyed by one, and a pension instead thereof to be paid to another; or they have arisen by virtue of a deed made by the consent of the parson, patron, and ordinary (e).

At the dissolution of monasteries there were many pensions issuing out of their lands, and payable to several ecclesiastical

(b) Gibs. 1046.

(c) 1 Ought. 213.

(d) Append. 94.

(e) F. N. B. 117.

persons; which lands were vested in the crown by the statutes of dissolution; in which statutes there is a saving to such persons of the right which they had to those pensions: but notwithstanding such general saving, those who had that right were disturbed in the collecting and receiving such pensions; and therefore by another statute, to wit, the 34 & 35 Hen. 8, c. 19, it was enacted, that pensions, portions, corrodies, indemnities, synodies, proxies, and all other profits due out of the lands of religious houses dissolved, shall continue to be paid to ecclesiastical persons by the occupiers of the said lands. And the plaintiff may recover the thing in demand, and the value thereof in damages in the ecclesiastical court, together with costs. And the like he shall recover at the common law when the cause is there determinable.

By the statute of *Circumspectè agatis*, 13 Edw. 1, st. 4, if a prelate of a church, or a patron, demand of a parson a pension due to him, all such demands shall be made in the Spiritual Court; in which case the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.

In pursuance of which, the general doctrine is, that pensions, as such, are of a spiritual nature, and to be sued for in the Spiritual Court; and accordingly, when they have come in question, prohibitions have been frequently denied or consultations granted, even though they have been claimed upon the foot of prescription (*f*).

But Lord Coke says, if a pension be claimed by prescription, there, seeing a writ of annuity doth lie, and that prescriptions must be tried by the common law, because common and canon law therein do differ, they cannot sue for such a pension in the Ecclesiastical Court (*g*).

But this hath sometimes been denied to be law: and in the case of *Jones v. Stone*, T., 12 Will. (*h*), Holt, Chief Justice, said he could never get a prohibition to stay a suit in the Spiritual Court against a parson for a pension by prescription.

In the case of *Dr. Gooche v. The Bishop of London*, M., 4 Geo. 2 (*i*), the bishop libelled in the Spiritual Court, suggesting that Dr. Gooche, as archdeacon of Essex, is to pay 10*l.* due to the bishop as a *prestation* for the exercise of his exterior jurisdiction. The doctor moved for a prohibition, alleging that he had pleaded there was no prescription; and then that being denied, a prohibition ought to go for defect of trial. On the contrary it was argued for the bishop, that the

(*f*) *Gibs.* 706; *Goodwin v. Dean* (*h*) *Wats.* c. 56; *Anonymous*, 2 and *Chapter of Wells*, *Noy*, 16; *Salk.* 550; *Johnson v. Rymon*, 12 *Smith v. Wallis*, 1 *Salk.* 58; *Cro. Mod.* 416.

Eliz. 675; *Collier's case*, 3 *Salk.* 58. (*i*) 1 *Str.* 879.

(*g*) 2 *Inst.* 491.

libel being general, it must not be taken that he goes upon a prescription; but it is to be considered in the same light as the common case of a pension which is suable for in the Spiritual Court; and the nature of the demand shows it must have its original from a composition, it being a recompense for the archdeacon's being allowed to exercise a jurisdiction which originally did belong to the ordinary. And by the Court: "The bishop may certainly entitle himself *ab antiquo* without laying a prescription; and as it is only laid in general, there is no ground for us to interpose, till it appears by the proceedings that a prescriptive right will come in question; if they join issue on the plea, it will then be proper to apply; but at present there ought to be no prohibition."

[A vicar sued in the Ecclesiastical Court the dean and chapter of Wells, parson of a church, for a pension, and they pray a prohibition, and it was denied; for that pension is a spiritual thing for which the vicar may sue in the Spiritual Court (*k*).—ED.]

M., 1724, *Bailey v. Cornes* (*l*), in the exchequer. A bill was preferred for a pension only, payable to the preacher of Bridgnorth; and upon hearing of the cause (which was afterwards ended by compromise) it seemed to be admitted that a bill might be brought for a pension only.

[The 26th of Henry 8, c. 3, intituled "The Bill for the First Fruits, with the yearly Pensions to the King," enacts as follows:—

They which
pay Pensions
to others out
of their Spi-
ritual Living
may retain
the Tenth
Part thereof.

[Sect. 21. "And forasmuch as every incumbent of the dignities, benefices, and promotions spiritual afore mentioned shall be charged by this act to the payment of the tenth part of the value of their dignities, benefices, and promotion spiritual, without any deduction or allowance of such pension or pensions, wherewith some of them been charged to pay to their predecessors during their lives, or to other persons to the use of such their predecessors during their lives; it is therefore ordained and enacted by authority aforesaid, that it shall be lawful to every incumbent charged with any such pension payable to any his predecessors, or to any to his use, to retain and keep in his hand the tenth part of every such pension; and that every such incumbent and his sureties shall from henceforth be acquitted and discharged of the said tenth part of every such pension, by virtue and authority of this present act; any decree, ordinance or assignment of any ordinary, or any collateral writing or security made for such pension to any spiritual person or persons, or to any to their uses for term of their lives, in any wise notwithstanding; and that as well every incumbent, as such persons as stand bound for him for payment of any such pensions, shall plead this act in every of the king's courts, for the clear extinguishment and discharge of the tenth part of every such pension.

(*k*) [Trin. 3 Car. C. B. *The Vicar of Halifax's case*, Godol. 198.] (*l*) Bunb. 183.

[Sect. 22. " And be it also ordained and enacted by authority aforesaid, that no pension shall hereafter be assigned by the ordinary, or by any other manner of agreement, by collateral surety, or otherwise, upon any resignation of any dignity, benefice, or promotion spiritual, above the value of the third part of the dignity, benefice, or promotion spiritual resigned: and if any pension amounting above the value of the third part of the dignity, benefice, or promotion spiritual heretofore resigned, be already limited and made sure to any spiritual person or persons, by decree of the ordinary, or otherwise by any collateral surety, or hereafter shall happen to be assigned and made sure to any person or persons spiritual, or to any other to their use, by decree of the ordinary, or by any other collateral surety, upon any resignation thereof; yet nevertheless the incumbent charged with such pension, nor his sureties collateral, shall not be compelled to pay any more pension than the value of the third part of his dignity, benefice, or promotion spiritual so resigned shall amount unto; but shall by authority of this act be clearly acquitted and discharged of so much of the said pension as shall amount above the value of the third part of the dignity or benefice resigned: any decree or assignment of the ordinary, or any collateral writings or sureties heretofore made, or hereafter to be had or made for the same, to the contrary thereof notwithstanding."

No Pension shall be reserved upon the Resignation of a Benefice, above the Value of the Third Part. 13 Eliz. c. 20.

Sect. 23. " And forasmuch as divers abbots and priors been charged to pay great pensions to sundry their predecessors yet living, to the great decay of their hospitalities and housekeeping; be it enacted by authority aforesaid, that every such predecessors of such abbots or priors, having any pension made sure unto them, or to any to their use, during their lives, amounting above the yearly value of 40s. shall from henceforth be defalked and abated of the moiety and half-deal of every such pension; and that every abbot, and all other persons charged for the payment of such pension above the said yearly value of 40s. shall be clearly acquitted and discharged by authority of this act of the moiety and half-deal thereof for ever; any decree or assignment thereof by the ordinary, or any writing or surety collateral had or made for the surety thereof notwithstanding."—ED.]

Abbots or Priors paying Pensions to their Predecessors.

A bishop may sue for a pension before a chancellor, and an archdeacon before his official (*m*).

If a suit be brought for a pension or other thing due of a parsonage, it seems that the occupier (though a tenant) ought to be sued; and if part of the rectory be in the hand of the owner, and part in the occupation of a tenant, the suit is to be against them both (*n*).

And though there is neither house, nor glebe, nor tithes, nor other profits, but only of Easter offerings, burials, and christenings, yet the incumbent is liable to pay the pension (*o*).

(*m*) Wood, b. 2, c. 2.

(*n*) Wats. c. 53.

(*o*) Hardr. 230.

If an incumbent leave arrearages of a pension, the successor shall be answerable, because the church itself is charged, into whatsoever hand it comes (*p*).

Pentecostals.

PENTECOSTALS, otherwise called *Whitsun-farthings*, took their name from the usual time of payment, at the feast of Pentecost. These are spoken of in a remarkable grant of King Henry VIII. to the dean and chapter of Worcester; in which he makes over to them all those oblations and obventions, or spiritual profits, commonly called Whitsun-farthings, yearly collected or received of divers towns within the archdeaconry of Worcester, and offered at the time of Pentecost. From hence it appears that pentecostals were oblations; and as the inhabitants of chapelries were bound, on some certain festival or festivals, to repair to the mother church, and make their oblation there, in token of subjection and dependence, so, as it seems, were the inhabitants of the diocese obliged to repair to the cathedral (as the mother church of the whole diocese) at the feast of Pentecost. Something like this was the coming of many priests and their people in procession to the church of St. Austin in Canterbury, in Whitsun-week, with oblations and other devotions; and in the register of Robert Read, who was made bishop of Chichester in the year 1396, there is a letter to compel the inhabitants of the parishes within the archdeaconry of Chichester, to visit their mother church in Whitsun-week (*q*).

These oblations grew by degrees into fixed and certain payments from every parish and every house in it, as appears not only from the aforementioned grant of King Henry VIII., but also from a remarkable passage in the articles of the clergy in convocation in the year 1399; where the sixth article is, a humble request to the archbishops and bishops that it may be declared whether Peter-pence, the holy loaf and pentecostals were to be paid by the occupiers of the lands, though the tenements were fallen or not inhabited, according to the ancient custom, when every parish paid a certain quota (*r*).

These are still paid in some few dioceses, being now only a charge upon particular churches, where by custom they have been paid (*s*).

And if they be denied where they are due, they are recoverable in the spiritual court (*t*).

(*p*) [*Trinity College, Cambridge*, v. *Tunstall*], Cro. Eliz. 810.

(*q*) Gibs. 976; 1 Warn. 339.

(*r*) Gibs. 976.

(*s*) Ken. Par. Ant. 596; Deg. p. 2, c. 15.

(*t*) Gibs. 977; [*Saundersan v. Claggett*], 1 P. Wms. 657.

Perambulation—See **Parish**.

Perinde valere.

PERINDE VALERE was a writ of dispensation granted by the pope to a clerk admitted to a benefice, although incapable; taking that name from the words of the dispensation, which made it *perinde valere*, that is, to be as effectual to the party as if he were capable (*u*).

Perjury (*x*).

IF perjury be committed in a temporal cause, it is punishable only in the temporal courts; but where it is committed in a spiritual cause, the spiritual judge hath authority to inflict canonical punishment, and prohibition will not go (*y*).

For by the statute of *Circumspectè agatis*, 13 Edw. 1, st. 4, "For breaking an oath, it hath been granted that it shall be tried in a spiritual court, when money is not demanded, but a thing done for the punishment of sin; in which case the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."

For although the case be spiritual, and the perjury is committed in the spiritual court, yet the judge there can only punish *pro salute animæ*; but the party grieved by such perjury must recover his damages at the common law (*z*).

In the statute of perjury, 5 Eliz. c. 9, s. 11, there is a proviso that the same shall not extend to any spiritual or ecclesiastical court; but such offender as shall be guilty of perjury, or subornation of perjury, shall and may be punished by such

(*u*) Gibs. 87.

(*x*) Perjury before the Conquest was punished by corporal chastisement, banishment, and sometimes death. 3 Inst. c. 74; 16 Vin. 310. Afterwards the king's council used to assemble, and punish perjuries at their discretion; and the spiritual court proceeded against the offenders *pro lesione fidei*. Cro. Eliz. 521. Unlawful oaths are mentioned as one reason for the institution of the court of Star Chamber in 3 Hen. 7, c. 1; and prosecutions in that court for this crime were very frequent both before and after the 5 Eliz. c. 9, which inflicted statutable penalties upon

persons guilty of perjury, and those who should procure them to commit it; and gave an action of 20*l.* against the former, and 40*l.* against the latter, to the party grieved. The court of Star Chamber was afterwards abolished by 16 Car. 1, c. 10, which in s. 2 recites that all matters examinable there might be remedied and redressed by the common law; the common law being since aided by the 2 Geo. 2, c. 25, and 23 Geo. 2, c. 11. See 4 Bl. Com. 137; Hawk. Pl. Cr. ch. 69.

(*y*) Gibs. 1013; 1 Ought. 9; Keilw. 39 b, 7.

(*z*) Gibs. 1013.

usual and ordinary laws as heretofore hath been, and yet is used and frequented in the said ecclesiastical court.

In the statute of the 5 Eliz. c. 23, concerning the writ *De excommunicato capiendo*, perjury in the ecclesiastical court is specified as an offence (amongst others) for which a person may be excommunicated. And conviction of perjury, either in the temporal or ecclesiastical courts, is a cause of deprivation of benefice. See **Deprivation**.

E. 11 Will. 3, *Bishop of St. David's case* (a). By Holt, C.J. It has been a question whether perjury in the spiritual court can be tried in the temporal; and in all the cases where it hath been, the persons have been acquitted, and so it hath been ended, but it is not yet settled.

M., 4 Geo. 1, *The King v. Lewis* (b). An information was moved for against a clergyman, for perjury at his admission to a living, upon an affidavit that the presentation was simoniacal. But the court refused to grant it till he had been convicted of the simony.

There are authorities and dicta to show that perjury in any court, not excepting courts ecclesiastical, may be punished by indictment or information in the temporal courts (c); but it must be at common law as it is aided by stat. 2 Geo. 2, c. 25, 23 Geo. 2, c. 11, and 31 Geo. 2, c. 10, and not upon the stat. of Eliz. (d).

Perpetual Cure—See **Curate**.

Pews in the Church—See **Church**.

Peter=pence.

PETER-PENCE was an annual tribute of one penny, paid at Rome out of every family at the feast of St. Peter (e).

Physicians.

1. **“FORASMUCH** as the soul is far more precious than the body, we do prohibit under the pain of anathema that no physician for the health of the body shall prescribe to a sick

(a) Ld. Raym. 451.

(b) Str. 70.

(c) See *The King v. Green*, 5 Mod. 348; 2 Rol. Abr. 257; 16 Vin. Abr. 313, 314.

(d) [See on this subject Mr. Chitty's work on Criminal Law, vol. ii. ch. ix.]

(e) Gibs. 87.

person any thing which may prove perilous to the soul. But when it happens that he is called to a sick person, he shall first of all effectually persuade him to send for the physicians of the soul; that after the sick person hath taken care for his spiritual medicament, he may with better effect proceed to the cure of his body. And the transgressors of this constitution shall not escape the punishment appointed by the council (*f*)."

That is, by the council of Lateran, under Innocent III., from the canons of which council this constitution was taken; which punishment is a prohibition from the entrance of the church until they shall have made competent satisfaction (*g*).

By the 3 Hen. 8, c. 11, "Forasmuch as the science and cunning of physic and surgery (to the perfect knowledge whereof be requisite both great learning and ripe experience) is daily within this realm exercised by a great multitude of ignorant persons, of whom the greater part have no manner of insight in the same nor in any other kind of learning, some also can no letters on the book; so far forth, that common artificers, as smiths, weavers, and women, boldly and accustomedly take upon them great cures, and things of great difficulty, in the which they partly use sorcery and witchcraft, partly apply such medicines unto the disease as be very noxious, and nothing meet thereof; to the high displeasure of God, great infamy to the faculty, and the grievous hurt and destruction of many of the king's liege people, most especially of them that cannot discern the uncunning from the cunning: Be it therefore (to the surety and comfort of all manner of people) enacted, that no person within the city of London, nor within seven miles of the same, shall take upon him to exercise and occupy as a physician or surgeon, except he be first examined, approved, and admitted by the bishop of London, or by the dean of St. Paul's for the time being, calling to him or them four doctors of physic, and for surgery other expert persons in that faculty, and for the first examination such as they shall think convenient, and afterwards always four of them that have been so approved; upon pain of forfeiture, for every month that they do occupy as physicians or surgeons, not admitted nor examined after the tenor of this act, of 5*l.*, half to the king, and half to him that shall sue. And that no person out of the said city, and precinct of seven miles of the same, except he have been as is aforesaid approved in the same, take upon him to exercise and occupy as a physician or surgeon, in any diocese within this realm; unless he be first examined and approved by the bishop of the same diocese, or (he being out of the diocese) by his vicar-general, either of them calling to them such expert persons in the said faculties

(*f*) Wethershed, Lind. 330.

(*g*) Wethershed, Johns.

as their discretion shall think convenient, and giving their letters testimonial under their seal to him that they shall so approve; upon like pain to them that occupy contrary to this act (as is aforesaid), to be levied and employed after the form before expressed."

"Provided, that this act shall not be prejudicial to the universities of Oxford or Cambridge, or either of them; or to any privileges granted to them (*h*)."

[The possession of a diploma is not by itself evidence that its possessor is a physician (*i*).—ED.]

Incorporated
in London.

By the 14 & 15 Hen. 8, c. 5, physicians in London and within seven miles thereof are incorporated, with power to make statutes for the government of the society; and no physician shall practise within the said limits, till admitted by the president and community under their common seal; on pain of 5*l.* a month, half to the king, and half to the society. And four censors are to be chosen yearly, who shall have the ordering of the practitioners within the said limits, and the supervising of medicines; with power to fine and imprison (*j*).

And it is further enacted, that whereas in dioceses of England out of London, it is not light to find always men able sufficiently to examine (after the statute) such as shall be admitted to exercise physic in them; therefore no person shall be suffered to exercise or practise in *physic* through England, until such time as he be examined at London, by the president and three of the elects of the said society; and to have from them letters testimonial of their approving and examination; except he be a graduate of Oxford or Cambridge, which hath accomplished all things for his form without any grace (*k*).

But as to *surgeons*, the law remained as before; that they shall be licensed by the bishop of the diocese, or his vicar-general respectively. [It has been held that this is a public act (*l*). A doctor of physic who has been licensed by the college to practise in London and within seven miles cannot claim, as a matter of right, to be examined by the college, in order to being admitted a fellow (*m*). Nor is it clear that licentiates in physic have a right to demand admission into the college (*n*). A doctor who is not a member has no right to inspect the books of the college (*o*).—ED.]

Surgeons.

By 32 Hen. 8, c. 42, the barbers and surgeons of London were united and incorporated, and exempted from bearing

(*h*) [See title *Colleges [and Universities]*, p. 505.]—ED.]

(*i*) [*Moises v. Thornton*, 8 T. R. 303; 3 Esp. 4.]

(*j*) [As to what is not practising within the act, see *Rose v. Physicians' College* (in error), 4 M. & R. 404.]

(*k*) *Vide* 12 Mod. 602; [Anonymous, *per* Holt, L. C. J.]

(*l*) [*Physicians' College v. Harrison*, M. & M. 191; 4 M. & R. 104.]

(*m*) [*Rex v. Physicians' College*, 7 T. R. 282.]

(*n*) [*Rex v. Physicians' College*, 5 Burr. 2740.]

(*o*) [*West v. Physicians' College*, 1 Wills. 240; 5 Mod. 395.]

arms, or serving on inquests or offices. But they were not to use each other's trade. By the 18 Geo. 2, c. 15, the union was dissolved; and the surgeons of London were made a separate corporation, with power to enjoy the same privileges as by former acts or grants (p).

[Knowledge of Latin is a previous qualification necessary even to be apprenticed to a London surgeon (q).—ED.]

By 25 Geo. 2, c. 37, the bodies of murderers convicted and executed in London or Middlesex shall be delivered to Surgeons' Hall; and in other counties to such surgeons as the judge shall direct.

In the case of the College of Physicians against Levett, E., 11 Will., the plaintiffs brought an action of debt against the defendant for 25*l.* for having practised physic within London five months without licence. Upon *nil debet* pleaded, it was tried before Holt, chief justice, at Guildhall; and the defence was, that he was a graduate doctor of Oxford. But it was ruled by Holt, upon consideration of all the statutes concerning this matter, that he could not practise within *London* or seven miles round, without licence of the College of Physicians. And by his direction a verdict was given for the plaintiffs (r).

And the like was adjudged on a special verdict, M., 4 Geo. 1, 1717, in the case of Dr. West, who was a graduate of Oxford (s).

By the 32 Hen. 8, c. 40, all members of the College of Physicians in London are discharged of keeping watch or ward, or being chosen constables, &c. and are enabled to practise surgery. And it shall be lawful for the president and fellows of the said college yearly to choose four of their number, who shall have power, after being sworn, to enter the house of any apothecary in the said city, to search and view

May search
for faulty
Drugs.

(p) See *Sharpe, q. t. v. Law*, 4 Burr. 2133.

(q) [*Rex v. Surgeons' Company*, 2 Burr. 892.]

(r) Lord Raymond, 472. See also *Dr. Bonham's case*, 8 Rep. 107, where seven rules are laid down for the better direction of the president and commonalty of the college for the future; and note, that under the charters granted to the college, and confirmed by acts of parliament, they may fine and imprison any person for *bad practice* as a physician within the limits of their jurisdiction. *Groenvelt v. Burwell*, Lord Raymond, 454; Com. 76; 12 Mod. 386. For further information as to the rules of the college, see *Rex v. Dr. Askew et al.* 4 Burr. 2186. [Sir George Lee held, that a physician was not entitled to

call for an inventory as a creditor for fees due from the deceased, they being merely honorary by the civil law, *Baron Von Solendahl v. Dr. Hampe*, 1 Lee, 102; and for the same reason the common law courts have held that he cannot maintain an action for them, *Chorley v. Bolcot*, 4 T. Rep. 317; see also *Lipscombe v. Holmes*, 2 Campb. 441 (Lord Ellenborough); but as to an action for recovering the amount of his bill, see *Allison v. Haydon*, 4 Bing. 619; 6 C. & P. 246; *Blogg v. Prickers*, R. & M. 125 (Best); *Handley v. Hewson*, 4 C. & P. 100 (Tenterden); *Tuson v. Batting*, 3 Esp. 192 (Kenyon); *Gremaire v. Le Clerc Bois Valon*, 2 Campb. 144 (Lord Ellenborough); but see 55 Geo. 3, c. 194.—ED.]

(s) *Ibid.*; 10 Mod. 353.

his wares and drugs; and such as they shall find defective and corrupted, having called to their assistance the wardens of the mystery of apothecaries, or one of them, shall cause to be burnt or otherwise destroyed. Apothecaries denying entrance, to forfeit 5*l*. And by 1 Mar. s. 2, c. 9, if the wardens of the Apothecaries' Company shall neglect to go with the president, or the said four physicians so elected, they may search and punish apothecaries for faulty drugs without their assistance; and all persons resisting to forfeit 10*l*.

By the 34 & 35 Hen. 8, c. 8 (*t*), "Whereas, by the statute of 3 Hen. 8, c. 11, for the avoiding of sorceries, witchcraft, and other inconveniences, it was enacted, that no person within the city of London, nor seven miles thereof, should take upon him to exercise as physician or surgeon, except he be first examined, approved and admitted by the bishop of London and other, under the penalties in the same act mentioned; since the making of which act, the company and fellowship of surgeons in London, minding only their own lucres, and nothing the profit or ease of the diseased or patient, have sued and troubled divers honest persons, as well men as women, whom God hath endued with the knowledge of the nature, kind and operation of certain herbs, roots and waters, and the using and ministering of them to such as be pained with customable diseases, as women's breasts being sore, a pin and the web in the eye, uncomes of hands, burning, scaldings, sore mouths, the stone, strangury, saucelim, and morpew, and such other like diseases; and yet the said persons have not taken any thing for their pains or cunning, but have ministered the same to poor people only for neighbourhood and God's sake, and of pity and charity; and it is now well known, that the surgeons admitted will do no cure to any person but where they shall know to be rewarded with a greater sum or reward than the cure extendeth unto, for in case they would minister their cunning unto sore people unrewarded, there should not so many rot and perish to death for lack or help of surgery as daily do, but the greater part of surgeons admitted be much more to be blamed than those persons that they trouble, for although the most part of the persons of the said craft of surgeons have small cunning, yet they will take great sums of money and do little therefore, and by reason thereof they do oftentimes impair and hurt their patients rather than do them good; in consideration whereof, and for the ease, comfort and health of the king's poor subjects, it is enacted, that it shall be lawful to every person being the king's subject, having knowledge and experience of the nature of herbs, roots and waters, or of the operation of the same, by speculation or practice, to use and minister in and to

(*t*) [By 9 Geo. 2, c. 5, no prosecution or suit shall be carried on against a person for witchcraft.—*Ed.*]

any *outward* sore, uncome, wound, apostemations, outward swelling or disease, any herb or herbs, ointments, baths, poultice, and emplaisters, according to their cunning, experience and knowledge, in any of the diseases, sores and maladies aforesaid, and all other like the same, or drinks for the stone and strangury, or agues, without suit, trouble, penalty, or loss of their goods; the foresaid statute, or any other act, ordinance or statute notwithstanding."

In *Laughton v. Gardner* (*u*) this act is considered as repealed *quoad* the College of Physicians by 1 Mar. sess. 2, c. 9, which confirms the 14 & 15 Hen. 8, c. 5, and thereby abrogates all subsequent acts contrary to it; and though this was afterwards doubted in *Butler v. The College of Physicians* (*x*), it seems to receive some confirmation from the 10 Geo. 1, c. 20, since expired, which, though it recites former acts on the subject, does not mention the 34 & 35 Hen. 8 (*y*).

[By the 55 Geo. 3, c. 194, many important regulations are made relative to the education, examination, admission, and practice of apothecaries (*z*).—ED.]

Pie.

THE *pie* was a table to find out the service belonging to each day (*a*).

Pious Uses—See **Charitable Uses**.

Plays in the Church or Churchyard—See **Church**.

Plays in the Universities—See **Colleges**.

Plough-Alms.

THE *plough-alsms* was a kind of oblation, being most commonly a penny for every plough, to be paid between Easter and Whitsuntide (*b*).

(*u*) Cro. Jac. 121, 159.

(*x*) Cro. Car. 256.

(*y*) [As to liability for negligence, see *Seare v. Prentice*, 8 East, 348; *Slater v. Baker*, 2 Wils. 359; *Harmer v. Macmullen*, Peake, 59; *Peppin v.*

Shephard, 11 Price, 400; *Phillips v. Wood*, 1 Nev. & M. 434.—ED.]

(*z*) [See the cases collected in *Harrison's Digest*, tit. Physic.—ED.]

(*a*) Gibs. 263.

(*b*) 2 Still. 177.

Plurality (n).

1. <i>Restraints by Canon</i> . . .	118	|	<i>by Statute before August,</i>	
2. <i>Dispensations by Canon</i> . . .	120		1838	124
3. <i>Restraints and Dispensations</i>			4. <i>Since that period</i>	134

I.—*Restraints by Canon.*

Restraints
of Plurality
by Canon.

BY a canon made in the council of Lateran, holden under Pope Innocent III. in the year of our Lord 1215, it is ordained, that whosoever shall take any benefice with cure of souls, if he shall before have obtained a like benefice, shall *ipso jure* be deprived thereof, and if he shall contend to retain the same, he shall be deprived of the other; and the patron of the former, immediately after his accepting of the latter, shall bestow the same upon whom he shall think worthy (*o*).

“Before institution, it shall be inquired whether the presentee hath any other benefice with cure of souls; and if he hath such benefice, it shall be inquired whether he hath a dispensation; and if he hath not a sufficient dispensation, he shall by no means be admitted, unless he do first make oath, that immediately upon his taking possession of the benefice unto which he is instituted, he will resign the rest. Whereupon he who granteth institution shall immediately give notice to the bishops in whose dioceses such former benefices shall be, and also to the patrons, that they may dispose of the same (*p*).”

“When confirmation is to be made of the election of a bishop, amongst other articles of inquiry and examination according to the direction of the canons, it shall be diligently inquired, whether he who is elected had before his election several benefices with cure of souls; and if he be found to have had such, it shall be inquired whether he hath had a dispensation, and whether the dispensation (if he shall exhibit any) is a true dispensation, and extendeth to all the benefices which he possessed (*q*).”

According to which constitution we find, in the times of the archbishops Peccham and Winchelsea, that confirmation was denied to three bishops, by reason of pluralities without proper dispensation (*r*).

“He who shall have more benefices than one with cure of souls, without dispensation, shall hold only the last; and if he shall strive to hold the rest, he shall forfeit all. And it is further decreed, that he who shall take more benefices than one, having cure of souls, or being otherwise incompatible,

(*n*) [See sect. 29 of the 4th council of Lateran, title “*Quod nullus habeat duo beneficia cum curâ annexâ*.—Fol. edit. of General Councils, printed at Paris, 1671.—Ed.]

(*o*) Hughes, c. 16; Gibs. 903.

(*p*) Othob. Athon, 129.

(*q*) Ibid. 133.

(*r*) Gibs. 905.

without dispensation apostolical, either by institution or by title of commendam, or one by institution and another by commendam, except they be held in such manner as is permitted by the constitution of Gregory published in the council of Lyons, shall be deprived of them all, and be *ipso facto* excommunicated, and shall not be absolved but by us or our successors, or the apostolic see (s)."

Having Cure of Souls.]—Whether it be a cathedral or parochial church, or a chapel having cure of the parishioners, either *de jure* or *de facto*, so that there be a parish wherein he can exercise parochial rites; also, whether it be a dignity or office, or church, as there are many archi-presbyters, archdeacons and deans who have no church of their own, yet they have jurisdiction over many churches (t).

Or being otherwise incompatible.]—Namely, dignities, parsonages, and other ecclesiastical benefices, which require personal residence either by statute, privilege or custom (u).

In such manner as is permitted by the Constitution of Gregory.]—Namely, that he to whom the benefice is granted in commendam be of lawful age, and a priest, and that it be one only, and of evident necessity or advantage to the church, and to continue no longer than for six months (v).

And shall not be absolved but by us or our Successors, or the Apostolic See.]—And by another constitution of the same archbishop, if any shall otherwise absolve them, they shall be accursed (x).

But after all, these canons and constitutions were not intended to hinder or take away pluralities, but to render dispensations necessary; for a clerk was allowed to hold as many dignities or benefices as he could get, with the pope's dispensation, which was easily obtained from his legate or nuncio residing here, on paying the sums required (y).

[In a recent case (z), the Court of Exchequer, reversing the judgment of the Court of Queen's Bench, decided that the acceptance of a second living rendered the first living void as to the patron, and though not so as to incur a lapse without notice by the ordinary, yet so as to render it void as to the incumbent, and, as it should seem, the sale of the advowson simoniacal.—ED.]

(s) Peccham, Lind. 137.

(t) Ibid. 135.

(u) Ibid. 137.

(v) Ibid.

(x) Ibid. 339.

(y) Johns. 91. [Since the 1 & 2 Vict. c. 106 (*vide infra*, p. 132), the old law on this subject has become merely matter of history. See *Holland's case*, 4 Rep. 75; *Brazennose College v. Bishop of Salisbury*, 4 Taunt. 831; *Shute v. Higden*, Vaugh.

131; *Rex v. Bishop of London and Baldock*, W. Jones, 404; *Moir*, 448; *Wolverstan v. Bishop of London*, 2 Wils. 174, 200; 3 Burr. 1504; *Boteler v. Allington*, 3 Atk. 455; *Bulwer v. Bulwer*, 2 B. & A. 470; *King v. Priest*, Jones, 339.—ED.]

(z) [*Alston v. Atlay*, 7 Ad. & Ell. 311; S. C. 6 Nev. & Mann. 686; C. J. Tindal; see remarks of Wightman, *arguendo*, and the cases there cited.—ED.]

II.—*Dispensations by Canon.*

Regulation of
Dispensations
by Canon
[granted
before the
14th August,
1838.]

Can. 41. "No licence or dispensation for the keeping of more benefices with cure than one, shall be granted to any, but such only as shall be thought very well worthy for his learning, and very well able and sufficient to discharge his duty: that is, who shall have taken the degree of a master of arts at the least in one of the universities of this realm, and be a public and sufficient preacher licensed. Provided always, that he be by a good and sufficient caution bound to make his personal residence in each of his said benefices for some reasonable time in every year; and that the said benefices be not more than thirty miles distant asunder; and lastly, that he have under him, in the benefice where he doth not reside, a preacher lawfully allowed, that is able sufficiently to teach and instruct the people."

Very well worthy for his Learning.]—So is the tenor of the Lateran council under Innocent the Third against pluralities; where it is allowed, in this particular case and in no other, that the see apostolic may dispense with persons of sublime abilities and learning, that they may be honoured with more benefices than one (a).

A public and sufficient Preacher licensed.]—With regard to his being thus qualified (which in those days was not a common qualification), there is usually a proviso in the body of the dispensation, that in either of the churches he preach thirteen sermons every year, according to the orders of the Church of England published in that behalf, and therein handle the word of God religiously and reverently (b).

Bound to make his personal Residence for some reasonable Time.]—In every dispensation to hold two benefices, there is a proviso, that in that benefice from which he shall be the more absent, he shall exercise hospitality for at least two months every year: and that proviso being evidently founded on this canon, every pluralist, who doth not observe it, is punishable by ecclesiastical censures (c).

Not more than Thirty Miles distant.]—Heretofore it was usual to obtain licences from the king, to take two benefices beyond the distance of thirty miles, by way of dispensation with this canon; and in such cases we find this clause in the faculties granted by the archbishop, "The king's licence for distance beyond thirty miles having been first granted to you," or the like; by reason of which licence and clause, they have been usually called *royal dispensations*. But none of these (as it seemeth) have been granted since the Revolution; it having been then set forth in the declaration of rights, 1 Will. sess. 2, c. 2, that the power of suspending laws or the execution of

(a) Gibs. 910.

(b) Ibid.

(c) Ibid. 911.

laws, by regal authority without consent of parliament, is illegal; and with respect to acts of parliament in particular, it is enacted by that statute, that no dispensation by *non obstante* of any statute shall be allowed, unless the same shall be specially provided for in such statute (*d*).

Thirty Miles.]—H., 15 Geo. 3, *The King v. Clive* (*e*). In the Common Pleas: In a *quare impedit*, on the presentation to the rectory of Adderley St. Peter in the county of Salop, being a benefice of above 8*l.* value in the king's books, the declaration states, that Clive, being incumbent of Adderley, had accepted the vicarage of Clun, at more than thirty miles distance from Adderley, whereby the latter became void. Clive pleads a dispensation under the great seal, and denies that the livings are more than thirty miles distant. And upon that, issue is joined. On the trial it was proved, by an actual admeasurement along the turnpike road, that the distance from church to church was forty-eight miles, from parish to parish forty-three miles; that the direct horizontal distance from church to church was forty-two miles, from parish to parish thirty-eight miles: but that by computation in the country the two livings were but twenty-nine miles distant, and this was the usual method of computing distances upon such dispensations. Of which opinion was the judge who tried the cause, and a special jury, who found a verdict for the defendant. It was moved for a new trial, alleging that the measured distance was the only one the law could take notice of: and the statute of 35 Eliz. c. 6, was cited, wherein a mile is declared to contain eight furlongs, each furlong forty poles, and each pole sixteen feet and a half. On showing cause against a new trial, it was argued, that the distance of the parishes is a matter merely regulated by the canons of the church, which may be directory in such cases to the archbishop, but is not taken notice of in the statute of dispensations, nor ever called in question in the king's temporal courts: therefore the issue is immaterial. But if material, the ecclesiastical laws must be the rule in this case, and there the uniform practice has been to go by computed miles. And the court were clearly of opinion, that by the temporal law, the distance of the churches is immaterial; and they discharged the rule for a new trial.

N. B. In many parts of England, and also in Scotland, the computed miles most commonly run in the proportion of about two computed to three measured miles. What has been the original of the difference seems difficult to ascertain.

That he have under him, in the Benefice where he doth not reside, a Preacher lawfully allowed.]—In pursuance of this canon (and not of any thing in the statute), a clause to the like purpose is inserted in the faculty or dispensation (*f*).

And it is further provided by Canon 47, that whosoever

(*d*) Gibs. 911.

(*e*) Black. Rep. 968.

(*f*) Gibs. 911.

hath two benefices, shall maintain a preacher licensed, in the benefice where he doth not reside; except he preach himself at both of them usually.

Manner of
obtaining a
Dispensation.

The method which a presentee must pursue in order to obtain a dispensation, is as followeth:

He must obtain of the bishop in whose diocese the livings are, two certificates of the values in the king's books, and the reputed values and distance of such livings; one certificate for the archbishop, and the other for the lord chancellor. And if the livings lie in two dioceses, then two certificates, as aforesaid, are to be obtained from each bishop, each certifying the value in the king's books, and the reputed value of the living in his own diocese; and both of them the reputed distance of the two livings.

Which certificates may be in this form:

"To the Most Reverend Father in God, Thomas, by Divine Providence Lord Archbishop of Canterbury, Primate of all England, and Metropolitan:

"Whereas A. B., clerk, master of arts, vicar of C. in the county of D., and in my diocese of E., is presented to the rectory of F. in the county and diocese aforesaid: These are therefore to certify your grace, that the said vicarage of C. is valued in the king's books at —, is of the reputed yearly value of —; that the said rectory of F. is valued in the king's books at —, is of the reputed yearly value of —; and that they are distant from each other about — miles. Witness my hand the — day of —."

The like to the lord high chancellor of Great Britain.

He must also exhibit to the archbishop his presentation to the second living.

And also bring with him two papers of testimonials from the neighbouring clergy, concerning his behaviour and conversation; one for the archbishop, and the other for the lord chancellor.

The form of which testimonials may be thus:

"To the Most Reverend Father in God, Thomas, by Divine Providence Lord Archbishop of Canterbury, Primate of all England, and Metropolitan:

"We whose names and seals are hereunto subscribed and set, do humbly certify your grace, that we have personally known the life and behaviour of A. B., clerk, master of arts, vicar of C. in the county of D. and diocese of E., for the space of three years now last past; that he hath, during the said time, been of good and honest life and conversation, a faithful and loyal subject to his majesty King George the Third, and hath not (so far as we know) held, written, or taught any thing, but what the Church of England approves of and maintains. In witness whereof, we have hereunto set our hands and seals, this — day of — in the year of our Lord —."

*A. B., Rector of A.
C. D., Vicar of B.
E. F., Vicar of C."*

And he must in like manner exhibit to the archbishop his letters of orders of deacon and priest.

And he must also exhibit to the archbishop a certificate of his having taken the degree of master of arts at the least, in one of the universities of this realm, under the hand of the register of such university.

And in case he be not doctor or bachelor of divinity, nor doctor of law, nor bachelor of canon law, he is to procure a qualification (according to the form above expressed) as chaplain to some nobleman, or to some other person empowered by law to grant qualifications for pluralities (which is also to be duly registered in the faculty office), in order to be tendered to the archbishop, according to the statute. And if he hath taken any of the aforesaid degrees, which the statute allows as qualifications, he is to procure a certificate thereof in the manner before mentioned, and to exhibit the same to the archbishop (g).

After which his dispensation is made out at the faculty office, where he gives security according to the direction of the canon; and afterwards he must repair to the lord chancellor, for confirmation under the broad seal.

All which being done, he is then to apply himself to the bishop of the diocese where the living lies, for his admission and institution (h).

In pursuance of the statute and canons aforegoing, the form of a dispensation is usually as followeth:

Form of a
Dispensation.

" Thomas, by Divine Providence Archbishop of Canterbury, Primate of all England, and Metropolitan, by authority of parliament lawfully empowered for the purpose herein written: To our beloved in Christ A. B., clerk, master of arts, of — college in the university of —, and also chaplain to the Right Honourable C. Lord —, health and grace. The greater progress men make in sacred learning, the greater encouragement they merit; and the more their necessities are in daily life, the more necessary supports of life they require. Upon which considerations, and being moved by your supplications in this behalf, We do (by virtue and in pursuance of the power vested in us by the statutes of this realm) by these presents graciously dispense with you; that, together with the rectory of the parish church of — in the county of — and diocese of —, which you now possess, the annual fruits whereof, according to the valuation made in the books of first fruits and tenths of ecclesiastical benefices remaining in the exchequer of our sovereign lord the king, do not exceed the sum of —, you may freely and lawfully accept, and hold as long as you shall live, the rectory of the parish church of — in the county of — and diocese of —, not distant from the former above — miles or thereabouts, the annual fruits whereof, according to the valuation aforesaid, do not exceed the sum of —: Provided always, that in each of the churches aforesaid, as well in that from which it shall happen that you shall be for the greater part absent, as in

(g) Ecton, 444.

(h) Deg. p. 1, c. 4.

the other, on which you shall make perpetual and personal residence, you do preach thirteen sermons every year according to the ordinances of the Church of England promulgated in that behalf; and do therein sincerely, religiously, and reverently handle the holy word of God; and that in the benefice, from which you shall happen to be most absent, you do nevertheless exercise hospitality two months yearly; and for that time, according to the fruits and profits thereof, as much as in you lieth, you do support and relieve the inhabitants of that parish, especially the poor and needy: Provided also, that the cure of the souls of that church, from which you shall be most absent, be in the mean time in all respects laudably served by an able minister, capable to explain and interpret the principles of the Christian religion, and to declare the word of God unto the people, in case the revenues of the said church can conveniently maintain such minister; and that a competent and sufficient salary be well and truly allowed and paid to the said minister, to be limited and allotted by the proper ordinary at his discretion, or by us or our successors, in case the diocesan shall not take due care therein: Provided nevertheless, that these presents do not avail you any thing, unless duly confirmed by the king's letters patent. Given under the seal of our office of faculties, this — day of," &c.

The lord chancellor's confirmation:

"George the Third, &c. To all to whom these our present letters shall come, greeting: We have seen certain letters of dispensation to these presents annexed; which, and every thing therein contained, according to a certain act in that behalf made in the parliament of Henry the Eighth, heretofore king of England, our predecessor, we have ratified, approved, and confirmed, and for us, our heirs and successors, we do ratify, approve and confirm by these presents: So that the reverend A. B., clerk, master of arts, in the letters aforesaid named, may use, have and enjoy, freely and quietly with impunity, and lawfully, all and singular the things in the same specified, according to the force, form, and effect of the same, without any impediment whatsoever, although express mention of the certainty of the premises, or of any other gifts or grants by us heretofore made to the said A. B. be not made in these presents; or any other thing, cause, or matter whatsoever in any wise notwithstanding. In testimony whereof we have caused these our letters to be made patent. Witness ourself at Westminster, the — day of —, in the — year of our reign (i)."

[The stamp duty on a dispensation for holding two ecclesiastical dignities or benefices, or a dignity and a benefice, in England, where either of them shall be above the yearly value of 10*l.* in the king's books, is 40*l.*; and in all other cases 25*l.* (j).—ED.]

III.—*Restraints and Dispensations by Statute before August, 1838.*

Restraints of
Plurality by
Statute.

By the 21 Hen. 8, c. 13, s. 9, 10, 11 (k), "If any person having one benefice with cure of souls, being of the yearly

(i) [*Vide infra*, form of dispensation, under 1 & 2 Vict. c. 106.]

(j) [55 Geo. 3, c. 184.]

(k) [Confirmed by 25 Hen. 8, c. 21, Statute for Dispensations.]

value of 8*l.* or above, accept and take any other with cure of souls, and be instituted and inducted in possession of the same; then and immediately after such possession had thereof, the first benefice shall be adjudged in law to be void. And it shall be lawful to every patron, having the advowson thereof, to present another, and the presentee to have the benefit of the same, in such like manner and form as though the incumbent had died or resigned; any licence, union, or other dispensation to the contrary notwithstanding: and every such licence, union, or dispensation to be obtained contrary to this present act, of what name or quality soever they be, shall be utterly void and of none effect. And if any person or persons, contrary to this present act, shall procure and obtain at the court of Rome or elsewhere any licence, union, toleration, or dispensation, to receive and take any more benefices with cure than is above limited; every such person or persons, so suing for himself, or receiving and taking such benefice by force of such licence, union, toleration, or dispensation, that is to say, the same person or persons only, and none other, shall for every such default incur the penalty of 20*l.* and also lose the whole profits of every such benefice or benefices as he receiveth or taketh by force of any such licence, union, toleration, or dispensation; half to the king, and half to him that will sue for the same in any of the king's courts."

If any Person.—Although bishops are not within this act, otherwise than as commendataries, that is, having two benefices with cure, either by retainer, or *de novo*; yet it is a general law, which ought to be taken notice of without pleading, by the same reason that the statute of the 13 Eliz. c. 10, concerning leases of the clergy, hath often been adjudged a general law, though bishops are not included in it (*k*).

Having one Benefice.—So as that he hath been instituted, although he hath not been inducted into the same; for if he taketh a second benefice after such institution, the first is void, as much as if it had been taken after induction also (*l*).

*Of the yearly Value of 8*l.* or above.*—According to the valuation in the king's books; for so it was unanimously resolved by the Court of Common Pleas in the 23 Car. 2, and before that in the 8 Car. 1, by the same court, in the case of *Drake v. Hill*: which therefore is at this day taken for law, notwithstanding the two more ancient opinions to the contrary; one in *Dyer*, 7 Eliz., and the other in the case of *Bond v. Trickett* in the 43 Eliz. (*m*)

*Of 8*l.* or above.*—If such first benefice is under the yearly value of 8*l.* in the king's books, the same is not within this statute, but rests upon the law of the church, as it was before the statute (*n*).

(*k*) *Gibs.* 906.

(*l*) *Ibid.*

(*m*) *Ibid.*; *Wats.* c. 2.

(*n*) *Gibs.* 906.

Accept and take any other.]—It is not material in this case, of what value the second church is, or whether rated in the king's books at all; for the voidance will take place equally when the second is under, as when it is above 8*l.* a year (o).

And be instituted and inducted in possession of the same.]—Although the expression is copulative, and should therefore imply that the voidance which follows thereupon doth not take place till after induction, yet it hath been often adjudged that if one is instituted, and then obtains dispensation, and after that is inducted, the dispensation comes too late; not only because by institution the church is full of the incumbent, and one cannot have a dispensation, to *take* and *receive* (as the words of the act are) what he had before, but also because by institution he hinders others from being presented: and so by obtaining institution to many churches, with sequestration of the profits of them, the intent of this statute might be utterly frustrated (p).

And it shall be lawful to every Patron, having the Advowson thereof, to present another.]—If the first benefice was of less value than 8*l.* a year, yet by his acceptance of a second with cure, it is at this day *in jure* void by the received canon law: and there needs not any sentence declaratory in the spiritual court, to make way for the patron's presentation; for he may immediately thereupon (without either deprivation or resignation) present a new incumbent to the said church, and require his admission; and if the bishop doth refuse the patron's clerk, a *quare impedit* lies for the patron. But some opinions are, that the church is not void but by deprivation; and that the taking of a second benefice with cure in such case, until deprivation, is no cession: but this is to be understood, that it is no cession to the disadvantage of the patron; so as to make a lapse incur from the time of such cession, no notice having been given to the patron thereof. For until after such clerk shall have been actually deprived of his first benefice, and notice thereof given to the patron, he, though he may, yet need not to present: but then after such deprivation, the church is void *in facto* and *in jure*, so that he must at his peril present (q).

And if an incumbent of a church with cure under 8*l.* a year doth take a second benefice with cure, in which he is also instituted and inducted (no dispensation being obtained for the holding of them both), by which the first is void against the patron, so that he may present (as before is showed), but before the patron doth present upon such avoidance, the archbishop, by force of this statute, doth grant to the clerk a licence *perinde valere*, to hold the first with the second benefice; this is not a good licence (although confirmed according to the statute) to take away the patron's presentment, though his church was

(o) Gibs. 906.

(p) Ibid.

(q) Wats. c. 2.

only void by force of a canon, and not by statute; for by the canon the first benefice was so void, that the patron might have presented before any deprivation; and after the patron hath once a title to present, this title cannot be taken away from him by a subsequent licence, unless such a licence could make a void church full (*r*).

But if any person having one benefice with cure of souls, being of the yearly value of 8*l*. or above, do accept and take another benefice with cure of souls, and be instituted and inducted in possession of the same (although the last benefice be but of 3*l*. value), immediately after such possession had thereof, the first benefice is not only void in law but *in facto* also; so that the patron thereof must present to a living of such value, so void, within six months (without expecting notice from the ordinary) to avoid the lapse; it being then not only void by canon law, but also by act of parliament, in which all men are parties. But he need not (unless notice be duly given) present till such time as his clerk is inducted into another benefice. For, though by his institution he hath the cure of souls, and the church is full to several purposes, yet the words of the statute are, "and be instituted and inducted in possession of the same;" so that until he be inducted, there is no cession by this statute, but only by the canon law, by which law, in such case, also he may be deprived (*s*).

But the patron, if he pleaseth, may present so soon as his clerk is instituted into another benefice incompatible, although he hath no notice from the ordinary of any cession or deprivation made of the first benefice, by reason of his acceptance of another by institution; and though he was only instituted into the first benefice, and not inducted; or else, if he pleaseth, he may sue such person in the court christian, to have him deprived by sentence in this as well as in any other case where the living is void by the canon law only (*t*).

But this rule, that the accepting of a second benefice that is incompatible, doth make a cession or absolute avoidance of the former, hath its exceptions: as, 1. If a person having a benefice incompatible, be admitted, instituted, and inducted into a second benefice incompatible also, but doth not subscribe the articles according to this statute, his first benefice is not void, because by reason of that neglect he was never incumbent of the second. The like law seemeth to be, if a man hath obtained a second benefice incompatible with his former, by a simoniacal contract, for in such case also his presentation or collation, institution and induction, are utterly void and of none effect in law; however, the canon law, unless a pardon intervene, will reach him in this case of simony, for by that

(*r*) Wats. c. 2; [see *Alston v. Atlay*, 4 Nev. & Per. 499, where Wightman, *arguendo*, cites this passage.—Ed.]

(*s*) Wats. c. 2; see *Deprivation*.

(*t*) Wats. c. 2.

he may be deprived. 2. If he that hath a benefice incompatible, before he takes another, being duly qualified, doth obtain a sufficient dispensation, to hold at one and the same time more than one of such benefices as are incompatible; for by dispensation a man at this day with us (though he be not qualified by degree in the university, retainer, or birth) may hold as many benefices without cure, of what value soever, as he can get, all of them, or all but the last, being under the value of 8*l.* a year (*u*).

Any Licence, Union, or other Dispensation to the contrary notwithstanding.—The union here spoken of is meant of a temporary union for the life of the incumbent; instances of which are common both before and since the Reformation (*x*).

And every such Licence, Union, or Dispensation, contrary to this Act, shall be utterly void and of none effect.—One being possessed of two benefices by dispensation according to this statute, did afterwards by a triality (or a dispensation to hold three) obtain a third benefice, and enjoyed all the three; and Dyer says, that divers justices and serjeants were of opinion, that the first of the three was void, and the profits of the third forfeited by this clause, and that only the second remained to him (*y*).

Also in the case of the King against the Bishop of Chichester, where one had two benefices with cure, by dispensation, and then took a third with cure, (and, as it seemeth, without dispensation), it is said to have been adjudged that both the two first should be void (*z*).

And the words of Hobart are, “I hold, if a man take a triality which is not allowed him, he cannot by that take two benefices, because his dispensation is void (*a*).”

The rule of the canon law is, that if a person having two benefices incompatible, shall by dispensation accept a third, and be in quiet possession thereof, the two first shall be *ipso facto* void (*b*).

Upon all which considerations, if a third benefice is to be taken by one who already holds two by dispensation, the best way is to determine which of the two he will hold with the third, and to make the other void by resignation before he accepts the third (*c*).

Shall procure and obtain at the Court of Rome.—In the catalogue of faculties which were grantable at Rome in the times of popery (besides the common dispensations to hold two,

(*u*) Wats. c. 3.

(*x*) Gibs. 907.

(*y*) Ibid.; Anon. Dyer, 327.

(*z*) Ibid.; King v. Bishop of Chichester, Noy, 149.

(*a*) Colt and Glover v. Bishop of Coventry and Lichfield, Hob. 158.

(*b*) Gibs. 907.

(*c*) Ibid.; [The acts 36 Geo. 3, c. 33; 47 Geo. 3, sess. 2, c. 75; 48 Geo. 3, c. 5, were for the temporary purpose of quieting persons in the possession of benefices held with *augmented curacies*, there having been an *erroneous* doubt as to whether they fell within the Statute of Pluralities.]

three or four benefices incompatible) are these three that follow: 1. A dispensation to whatsoever and how many soever benefices incompatible to the value of 500*l.* a year; 2. To the value of 1000*l.* a year; 3. Without any restriction. The price of each rising gradually according to the degree of favour and profit (*d*).

Dispensation
of Plurality
by Statute.

And how much the practice, as well as law, of holding pluralities was altered by this statute, from what it was whilst the right of dispensation rested in the pope, will appear (amongst many other such like which might be mentioned), from the famous instance of Bogo de Clare, rector of St. Peter's in the East in Oxford, who, in the eighth year of King Edward I., was presented by the Earl of Gloucester to the church of Wyston in the county of Northampton, and obtained a dispensation to hold the same, together with one church in Ireland, and fourteen other churches in England in nine different dioceses, all which benefices were valued at that time at 268*l.* 6*s.* 8½*d.* (*e*).

By the statute of 21 Hen. 8, c. 13, s. 13—21, it is enacted "that all spiritual men being of the king's council, may purchase licence or dispensation to take, receive and keep three parsonages or benefices with cure of souls; and all other being the king's chaplains, and not sworn of his council, the chaplains of the queen, prince or princess, or any of the king's children, brethren, sisters, uncles or aunts, may semblably purchase licence or dispensation, and receive and keep two parsonages and benefices with cure of souls; every archbishop and duke may have six chaplains; every marquis and earl, five; viscount, and other bishop, four; chancellor of England for the time being, baron and knight of the garter, three; every duchess, marchioness, countess and baroness, being widows, two; treasurer, comptroller of the king's house, the king's secretary, and dean of his chapel, the king's amner, and master of the rolls, two; chief-justice of the King's Bench, one; warden of the five ports, one; whereof every one may purchase licence or dispensation, and receive, have and keep two parsonages or benefices with cure of souls. And the brethren and sons of all temporal lords which are born in wedlock may every of them purchase licence or dispensation to receive, have and keep as many parsonages or benefices with cure as the

(*d*) Gibs. 907.

(*e*) Ken. Par. Ant. 292; Gibs. 907; Wood's Hist. et Antiq. Univ. Oxon. 116.

[The 36 Geo. 3, c. 83, enacted that churches, curacies and chapels augmented by Queen Anne's Bounty, and made, by 1 Geo. 1, st. 2, c. 10, *perpetual cures and benefices*, shall be considered in law as benefices pre-

sentative; 59 Geo. 3, c. 40, had the temporary purposes of quieting persons who, having two benefices, had taken a third without having previously resigned one of the former, and were in possession of the third and the one which they meant to keep with it. See the anonymous case in Dyer's Reports, p. 327(a). See titles *Cures*, and *First Fruits*.—Ed.]

chaplains of a duke or archbishop. And the brethren and sons born in wedlock of every knight may every of them purchase licence or dispensation, and receive, take and keep two parsonages or benefices with cure of souls."

Parsonages or Benefices.] — Dispensations were granted heretofore for such a number of benefices, without specifying the particulars; and sometimes with an additional power to exchange, and take others; only keeping within the number in point of possession at one and the same time. But the later and safer way hath been, to grant dispensation only for preventing the voidance of a benefice in possession, by the taking of a second, however these words may be capable of a larger interpretation (*f*).

Every Duke, Marquis, Earl, &c.] — And although such duke, marquis, earl, or the like, be minors, and under age, yet they may retain chaplains within this act: as was adjudged in the case of *The Queen v. The Bishop of Salisbury*; even though the lord admiral, in whose custody the minor was, might retain chaplains in his own right (*g*).

But if the son and heir apparent of a baron, or such like, retaineth a chaplain, and his father dieth, and the chaplain purchaseth dispensation, such retainer will not avail, because it was not available at the beginning (*h*).

And if the person who retained dies, or is removed, or is attainted, before any effect of the retainer, it is gone, and shall have no effect afterwards; but if it taketh effect before, it continues good, notwithstanding death, or attainder, or removal (*i*).

Brethren and Sons born in Wedlock of every Knight.] — But not brethren or sons of baronets; which dignity hath been created since the making of this act (*j*). That is, if such baronets are not also knights.

[The son of a bishop, and of course the bastard of a temporal peer, was not qualified (*k*). — ED.]

Sect. 22. "Provided, that the said chaplains so purchasing, taking, receiving, and keeping benefices with cure of souls, as is aforesaid, shall be bound to have and exhibit, where need shall be, letters under the sign and seal of the king or other their lord and master, testifying whose chaplains they be; and else not to enjoy any such plurality of benefices by being such chaplain: any thing in this act notwithstanding."

Letters under the Sign and Seal.] — Which may be in this form (*l*): —

"Know all men by these presents, that I, the Right Honourable A. Lord —, Baron of —, have admitted, constituted, and appointed

(*f*) Gibs. 907.

(*g*) *Acton's case*, 4 Co. 119; Gibs. 908.

(*h*) *Drury's case*, 4 Co. 90.

(*i*) Gibs. 908.

(*j*) Gibs. 908.

(*k*) [Com. Dig. Eglise (N. 8).

(*l*) [*Whetstone & Hickford*, Godb. 41. *Anon. Sav.* 153.]

the reverend B. C., clerk, my domestic chaplain, to have, hold, and enjoy all and singular the benefits, privileges, liberties, and advantages, due and of right granted to the chaplains of noblemen by the laws and statutes of this realm. Given under my hand and seal, the — day of —, in the year,” &c.

And the same being under hand and seal, it seemeth that if there shall be lawful cause to discharge him, such discharge must be also under hand and seal: which may be to this effect:—

“Whereas I, the Right Honourable A., Lord —, Baron of —, by writing under my hand and seal, bearing date the — day of —, did admit, constitute, and appoint B. C., clerk, my domestic chaplain; to hold and enjoy all benefits, privileges, and advantages belonging to the same: Now by these presents, I, the said A., Lord —, do for divers good and lawful causes and considerations, dismiss and discharge the said B. C. from my service as domestic chaplain, and from all privileges and advantages to him granted as aforesaid. Given under my hand and seal, the — day of —, in the year,” &c.

Sect. 23. “And all doctors and bachelors of divinity, doctors of law, and bachelors of law canon, and every of them, which shall be admitted to any of the said degrees by any of the universities of this realm, and not by grace only, may purchase licence, and take, have and keep two parsonages or benefices with cure of souls.”

Bachelors of Law Canon.]—Dr. Ayliffe says, that no degree in the canon law hath been taken since the Reformation (*l*).

And not by Grace only.]—This seems to be explained by a like expression in the statute of the 14 Hen. 8, c. 5, entitled “The Privileges and Authority of Physicians in London;” by which provision is made for the examination of physicians by the president and elects, “except he be a graduate of Oxford or Cambridge, which hath accomplished all things for his form, without any grace;” that is, (as it seemeth), hath performed the statutable exercises, in order to such degree, without any favour or dispensation therein (*m*).

Sect. 24. “Provided, that every archbishop, because he must occupy eight chaplains at consecration of bishops; and every bishop, because he must occupy six chaplains at giving of orders and consecration of churches, may every of them have two chaplains over and above the number above limited unto them; whereof every one may purchase licence or dispensation, and take, receive and keep as many parsonages and benefices with cure of souls, as is before assigned to such chaplains.”

(*l*) Ayl. Par. 418. Hen. VIII., in the 37th year of his reign, issued a mandate to the University of Cambridge to prohibit the taking of de-

grees in the canon or pontifical law. —See Mr. Christian’s note to I Bla. Com. 392.

(*m*) Gibs. 908, 909.

Dr. Ayliffe says, that notwithstanding this clause, bishops can only qualify this number for the purposes here mentioned, of ordination and consecration; but that they can qualify no more than four, for a licence or dispensation. But this seemeth contrary to the words of the clause as above recited (n).

Sect. 25. "Provided also, that no person to whom any number of chaplains or any chaplain, by any of the provisions aforesaid is limited, shall in anywise, by colour of any of the same provisions, advance any spiritual person or persons, above the number of them appointed, to receive or keep any more benefices with cure of souls, than is above limited by this act, any thing specified in the said provisions notwithstanding; and if they do, then every such spiritual person or persons, so advanced above the said number, to incur the penalty contained in this act."

Above the Number.]—Although a chaplain retained above the number, be promoted before those who were duly retained according to the statute, such retainer (above the number) shall neither avail him, nor divest those who were duly retained of the right of purchasing dispensation; nor shall he ever have benefit by his retainer (even though the rest are dead) unless it be renewed upon the death of one of those who made up the statutable number: inasmuch as the retainer was null *ab initio*; and a chaplain once legally qualified cannot be discharged at pleasure, to make way for others (o).

So if a baron (who can have but three chaplains) doth qualify three accordingly, and they being advanced to pluralities, he upon displeasure or for other cause doth dismiss them from their attendance, yet they are his chaplains at large, and may hold their pluralities for their lives; and though he may entertain as many others as he will, yet he cannot qualify any of them to hold a plurality, whilst the first three are living. And so of others. But as any of the three first die, he may qualify others, if so be he retain them anew after the death of the first (p).

If a baron, who may retain three chaplains as aforesaid, be made warden of the cinque ports (who may have a chaplain in respect of his office), yet shall he have but three; and if a baron hath three, and be made an earl, yet he shall have but five in all; and so of the rest: because the statute is to be taken strictly against pluralities (r).

Sect. 29. "Provided, that it shall be lawful to every spiritual person, being chaplain to the king, to whom it shall please the king to give any benefices or promotions spiritual, to what number soever it be, to accept and take the same without incurring the penalty and forfeiture of this statute."

Being Chaplain to the King.]—It hath been resolved in

(n) Ayl. Par. 418.

(o) Gibs. 909.

(p) Wats. c. 3.

(r) Gibs. 909.

the Court of King's Bench, that a chaplain extraordinary is not a chaplain within this statute, but only the chaplains in ordinary; that is, not one who has only an entry of his name made in the book of chaplains, but one who has also a waiting time (s).

To accept and take the same.]—Without previous dispensation; which the king himself, as supreme ordinary, hath power to grant, and his presentation of his own chaplain imports the granting of it. But if the king's chaplain be presented to a second benefice by a subject, a dispensation is necessary, and must be obtained before his institution to the second living (t).

Sect. 31. "Provided also, that no deanry, archdeaconry, chancellorship, treasurership, chanter'ship, or prebend in any cathedral or collegiate church, nor parsonage that hath a vicar endowed, nor any benefice perpetually appropriate, be taken or comprehended under the name of benefice having cure of souls, in any article afore specified."

Sect. 33. "Provided also, that every duchess, marquiss, countess, baroness, widows, which have taken, or that hereafter shall take any husbands under the degree of a baron, may take such number of chaplains as is above limited to them being widows, and that every such chaplain may purchase licence to have and take such number of benefices with cure of souls, in manner and form as they might have done if their said ladies and mistresses had kept themselves widows."

Being Widows.]—And though they marry, the retainer before marriage stands good, and shall have its effect after marriage. If they marry under the degree of a baron, they are specially provided for in this clause; and if they marry a baron, or above that degree, my Lord Coke has laid down the law in the following words: "If a woman baroness retaineth two chaplains according to the statute, and afterwards taketh one of the nobility to husband, the retainer of these two chaplains remaineth, and they without new retainer may take two benefices, for their retainer was not ended by the marriage (u)."

[This act of Henry the Eighth, as well as certain other acts, was repealed by the 57 Geo. 3, c. 99, so far as related "to spiritual persons holding farms and to leases of benefices and livings, and to buying and selling, and to residence of spiritual persons on their benefices."

(s) Gibs. 909; 1 Salk. 162; [*Brown v. Mugg*, S. C. 2 L. Raymond, 791.]

(t) Gibs. 909; 1 Salk. 161.

(u) 4 Co. 119; Gibs. 909. [As the cases must necessarily be very few, if any, which will require a reference to 57 Geo. 3, c. 99, it has not been

thought expedient to print it in this work. The sections of 21 Hen. VIII. are preserved for their historical curiosity as to the privileges of peers, &c., which are not mentioned in detail, but only alluded to (sect. 10), in the 57 Geo. 3, c. 99.—ED.]

[IV. *Restraints and Dispensations by Statute since August 1838.*

[This statute, of 57 Geo. 3, c. 99, as well as that of Henry the Eighth, which concerns the subject of this title, Pluralities, has been repealed by 1 & 2 Vict. c. 106. The operation, however, of this last statute is not retrospective, and does not affect penalties already incurred, or licences already granted. It regulates all cases which may arise after the 14th of August, 1838; and, as will be seen on perusal, entirely annihilates the distinction between void and voidable preferments, establishing, for the future, new regulations upon the subjects of plurality and residence, which affect all persons and all benefices.

1 & 2 Vict.
c. 106.

[The statute was passed on the 14th of August 1838, and is entitled, "An Act to abridge the holding of Benefices in Plurality, and to make better Provision for the Residence of the Clergy." After reciting that the 21 Hen. 8, had been partly repealed by 57 Geo. 3, c. 99, it enacts:—

Both Acts
now wholly
repealed;
saving as to
Penalties
already in-
curred, or
Licences
already
granted.

["THAT so much of the said recited acts as is now in force shall be and the same is hereby repealed, save and except only such part of the said last recited act as repeals certain acts and parts of acts therein particularly recited: Provided, that nothing herein contained shall exempt any person from any penalties incurred under the said last-recited act before the time of passing this act, or take away or affect any proceedings for recovery thereof, whether commenced or not before the passing of this act, or shall annul or abridge any licence granted under the provisions of the said last recited act before the time of passing this act."

Not more
than two
Preferments
to be held
together;

[Sect. 2. "That from and after the passing of this act no spiritual person holding more benefices than one shall accept and take to hold therewith any cathedral preferment or any other benefice; and that no spiritual person holding any cathedral preferment and also holding any benefice shall accept and take to hold therewith any other cathedral preferment or any other benefice; and that no spiritual person holding any preferment in any cathedral or collegiate church shall accept and take to hold therewith any preferment in any other cathedral or collegiate church, any law, canon, custom, usage, or dispensation to the contrary notwithstanding: Provided, that nothing herein-before contained shall be construed to prevent any archdeacon from holding, together with his archdeaconry, two benefices, under the limitations herein-after mentioned with respect to distance, joint yearly value and population, and one of which benefices shall be situate within the diocese of which his archdeaconry forms a part, or one cathedral preferment in any cathedral or collegiate church of the diocese of which his archdeaconry forms a part, and one benefice situate within such diocese, or to prevent any spiritual person holding any cathedral preferment, with or without a benefice, from holding therewith any office in the same cathedral or collegiate church, the duties of which are statutably or accustomably performed by the spiritual persons holding such preferment."

[As by this section no spiritual person may hold more than one *preferment* and one *benefice* together, it was of course very necessary that there should be an accurate definition of these terms, and such is to be found in section 124, which enacts,

1 & 2 Vict.
c. 106.

One Preferment and one Benefice only to be held together.

[“That in all cases where the term ‘cathedral preferment’ is used in this act, it shall be construed to comprehend (unless it shall otherwise appear from the context) every deanery, archdeaconry, prebend, canonry, office of minor canon, priest vicar, or vicar choral, having any prebend or endowment belonging thereto, or belonging to any body corporate consisting of persons holding any such office, and also every precentorship, treasurership, sub-deanery, chancellorship of the church, and other dignity and office in any cathedral or collegiate church, and every mastership, wardenship, and fellowship in any collegiate church; and that in all cases where the term ‘benefice’ is used in this act, the said term shall be understood and taken to mean benefice with cure of souls, and no other (unless it shall otherwise appear from the context), and therein to comprehend all parishes, perpetual curacies, donatives, endowed public chapels, parochial chapelries, and chapelries or districts belonging or reputed to belong, or annexed or reputed to be annexed, to any church or chapel, any thing in any other act to the contrary notwithstanding.”

S. 124.
Definition of the Term
“Cathedral Preferment,”

and “Benefice.”

[It is enacted by sect. 3,

[“That, except as hereinafter provided, no spiritual person holding any benefice shall accept and take to hold therewith any other benefice, unless it shall be situate within the distance of ten statute miles from such first-mentioned benefice (x).”

S. 3.
Two Benefices, unless within ten Miles of each other, not to be held together.

[The computation of this distance is provided for by section 129, which enacts,

[“That the distance between any two benefices for the purposes of this act shall be computed from the church of the one to the church of the other by the nearest road or footpath, or by an accustomed ferry; and if on one of the said benefices there be two or more churches, then the distance shall be computed from or to the nearest of such churches, as the case may be; or if on one of such benefices there be no church, then in such manner as shall be directed by the bishop of the diocese in which the benefice proposed to be taken and held by any spiritual person in addition to one already held by him shall be locally situate.”

S. 129.
Distance how to be computed.

[It is enacted by sect. 4,

[That, except as hereinafter provided, no spiritual person holding a benefice with a population of more than three thousand persons shall accept and take to hold therewith any other benefice having, at the time of his admission, institution, or being licensed thereto, a population of more than five hundred persons, nor shall any spiritual person holding a benefice with a population of more than

S. 4.
Nor if Population of one such Benefice is more than 3000, or joint yearly Value shall exceed 1000*l*.

(x) [See sect. 129.]

1 & 2 Vict.
c. 106.

five hundred persons accept and take to hold therewith any other benefice having, at the time of his admission, institution or being licensed thereto, a population of more than three thousand persons, nor shall any spiritual person hold together any two benefices if, at the time of his admission, institution or being licensed to the second benefice, the value of the two benefices jointly shall exceed the yearly value of one thousand pounds (*y*)."

[The mode of computing the population for the purposes of this statute is provided for by section 130, which enacts,

S. 130.
Population
how to be
computed.

[" That whenever the population of any place shall be required by this act to be ascertained, the same shall be taken from the latest returns of population made under any act of parliament for that purpose at the time when the question shall arise, if such returns shall apply to the place respecting which the question shall be, but if such place shall only form part of a parish or district named in such returns, then such returns shall be taken to represent truly the population of the parish or district named therein, and from them the population of the place required shall be computed, according to the best evidence of which the subject shall be capable."

[But it is further enacted by sect. 5,

But by S. 5,
if yearly
Value of one
of said Bene-
fices be less
than 150*l*.,
and the
Population
shall exceed
2000 Persons,
the two may
be held
jointly after
Statement of
Reasons by
the Bishop.

Proviso as to
Residence on
larger Parish.

[" That in case the *bishop or bishops*, as the case may be, to whom any two benefices within the distance of ten miles from each other shall respectively be subject, which, under the provision hereinbefore contained, might not be holden together, but one of which benefices shall be below the yearly value of one hundred and fifty pounds, and the population of which shall exceed two thousand persons, shall think it expedient that the incumbent of one of such benefices should be permitted to hold the said two benefices together, the said bishop or bishops shall be at liberty, upon application made to him or them for that purpose by such incumbent, to state in writing under his or their hand or hands the reason why such benefices should be holden together, and in such case it shall be lawful for the said incumbent to hold the said two benefices together: Provided, that in the last-mentioned case the bishop of the diocese within which such benefice having a population exceeding two thousand persons is situate may from time to time, if he shall so think fit, by an order under his hand and revocable at any time, require that such incumbent should keep residence on and personally serve such benefice during the space of nine months in each year; and if such incumbent shall not, in obedience to the terms of such order and until the same be revoked, reside on and personally serve such benefice, he shall be liable to all the penalties for non-residence(*z*) imposed by this act, notwithstanding he may have a legal exemption permanent or temporary from residence, or may be resident on some other benefice of which he may be possessed, or may be performing the duties of an office, and the performance of the duties

(*y*) [See sect. 130.]

(*z*) [See title *Privileges and Re-
straints of the Clergy*, p. 367.]

of which might in other cases be accounted as residence on some benefice: Provided, that such spiritual person may, within one month after service upon him of any such order, appeal to the archbishop of the province, who shall confirm or rescind such order as to him may seem just and proper (a)."

1 & 2 Vict.
c. 106.

[Sect. 132 of this act provides—

["That nothing in this act contained shall be deemed, construed, or taken to derogate from, diminish, prejudice, alter, or affect, otherwise than is expressly provided, any powers, authorities, rights, or jurisdiction already vested in or belonging to any archbishop or bishop under or by virtue of any statute, canon, usage, or otherwise howsoever."

Not to affect
former Powers
of Bishops.

[By sect. 133 it is provided that this act shall not extend to Ireland.

[By the statute 3 & 4 Vict. c. 113, s. 71, a provision is made for the annexation of *sinecures* to benefices with cure of souls:

["That with respect to any benefice with cure of souls which is held together with or in the patronage of the holder of any prebend or other sinecure preferment belonging to any college in either of the universities, or to any private patron, arrangements may be made by the like authority, and with the consents of the respective patrons, for permanently uniting such preferment with such benefice: provided that this act shall not apply to or affect any prebend or other sinecure preferment in the patronage of any college or of any lay patron in any other manner than as is herein expressly enacted."

Annexation
of Sinecures
to Cures of
Souls.

[By sect. 72 it is provided, that benefices may be divided or consolidated with the consent of patrons. And by sect. 74, the income of two benefices belonging to one patron may be apportioned in certain cases. See these clauses and the principal provisions of this statute as to preferments tenable by archdeacons, &c. under the title *Deans and Chapters*, vol. i. p. 125. See also the title *Benefice, Augmentation of*, vol. i. p. 184*f* of this work. See below, at the end of this chapter, as to the compatibility of an *honorary* canonry with two benefices.

Division and
Constitution
of Benefices.

[But to hold the two benefices allowed by this act the sixth section enacts—

["That it shall be necessary for such person to obtain from the Archbishop of Canterbury for the time being, a licence or dispensation for the holding thereof, which licence or dispensation the said archbishop is hereby empowered to grant under the seal of his office of faculties, upon being satisfied as well of the fitness of the

Licence or
Dispensation
to hold to-
gether any
two Bene-
fices must be
obtained from
the Arch-
bishop of
Canterbury.

(a) [See form of licence below.]

1 & 2 Vict.
c. 106.

person as of the expediency of allowing such two benefices to be holden together, and that such licence or dispensation shall issue in such manner and form as the said archbishop shall think fit; and for such licence or dispensation there shall be paid to the registrar of the said office the sum of thirty shillings and no more, and to the seal keeper thereof the sum of two shillings and no more; and that no stamp duty, nor any other fee, save as hereinbefore mentioned, shall be payable on the licence or dispensation to be granted as aforesaid, nor shall any confirmation thereof be necessary; nor shall it be required of any spiritual person applying for any such licence or dispensation to give any caution or security by bond or otherwise before such licence or dispensation is granted; and if the said Archbishop of Canterbury shall refuse or deny to grant any such licence or dispensation as aforesaid, it shall be lawful for her Majesty, if she, by the advice of her privy council, shall think fit, upon application by the person to whom such licence or dispensation shall have been refused or denied, to enjoin the said archbishop to grant such licence or dispensation, or to show to her Majesty in council sufficient cause to the contrary, and thereupon to make such order touching the refusal or grant of such licence or dispensation as to her Majesty in council shall seem fit, and such order shall be binding upon the archbishop."

A Statement
of certain
Particulars to
be made by
every Spi-
ritual Person
to the Bishop
of the Diocese
previous to
Application
for a Licence
or Dispen-
sation.

[Sect. 7. "That where any spiritual person shall be desirous of obtaining a licence or dispensation for holding together any two benefices, such spiritual person shall, previously to applying for the grant of such licence or dispensation, deliver to the bishop of the diocese where both benefices are situate in the same diocese, or to the bishops of the two dioceses where such benefices are situate in different dioceses, a statement in writing under his hand, verified as such bishop or bishops respectively may require, according to a form or forms to be promulgated from time to time by the Archbishop of Canterbury, and approved by the Queen in council, in which statement such spiritual person shall set forth, according to the best of his belief, the yearly income arising from each of the said benefices, separately, on an average of the three years ending on the twenty-ninth day of September next before the date of such statement, and the sources from which such income is derived, and also the yearly amount, on an average of the same period of three years, of all taxes, rates, tenths, dues, and other permanent charges and outgoings to which the same benefices are respectively subject, and also the amount of the population of each of the said benefices, to be computed according to the last returns made under the authority of parliament, and also the distance between the two benefices, to be computed according to the directions of this act; and it shall be lawful for the bishop to whom such statement shall be delivered to make any inquiry which he may think right as to the correctness of the same in respect to the benefices or benefice within his diocese; and such bishop is hereby required, within the space of one month after he shall have received such statement as aforesaid, to transmit to the Archbishop of Canterbury a certificate under his hand, in which certificate such bishop shall set forth or shall annex thereto a copy

Bishop may
make inquiry
as to the Ac-
curacy of
Statement.
Bishop to
transmit a
Certificate to
the Arch-
bishop of
Canterbury,
setting forth

of the statement delivered to him as aforesaid, and shall thereby certify the amount at which he considers that the annual value and the population of each of the two benefices (where both benefices are situate in the same diocese) and the distance of the said two benefices from each other, or the amount at which he considers the annual value and the population of the benefice within the diocese of such bishop (where the two benefices are situate in different dioceses), and the distance of such benefice from the other benefice, ought to be taken, with respect to the licence or dispensation in question; and whenever both or either of the benefices shall be in the diocese or jurisdiction of the Archbishop of Canterbury, a certificate shall be made out in manner aforesaid by the archbishop, and shall be retained by him."

1 & 2 Vict.
c. 106.

Copy of the
Statement
made to the
Bishop and
other Par-
ticulars.

[Sect. 8. "That in estimating the annual value of any benefice for the purpose of any such certificate as aforesaid, it shall be lawful for the archbishop or bishop by whom such certificate shall be made, and every such archbishop and bishop is hereby directed, to deduct from the gross amount of the yearly income arising from such benefice all taxes, rates, tenths, dues, and other permanent charges and outgoings to which such benefice shall be subject, but not to deduct or allow for any stipend or stipends to any stipendiary curate or curates, nor for such taxes or rates in respect of the house of residence on any benefice, or of the glebe land belonging thereto, as are usually paid by tenants or occupiers, nor for monies expended in the repair or improvement of the house of residence and buildings and fences belonging thereto."

How annual
Value of Two
Benefices to
be held to-
gether by
Dispensation
to be esti-
mated.

[Sect. 9. "That the certificate or certificates to be transmitted to or retained by the Archbishop of Canterbury as aforesaid shall be deposited in the said office of Faculties, and in the event of the required licence or dispensation being granted, shall for the purposes of this act be conclusive evidence of the annual value and population of each of the benefices to which the same shall relate, and of their distance from each other; and the registrar of the Faculties shall and he is hereby required to produce such certificate or certificates to any person who may require to inspect the same."

Certificate to
be deposited
in Office of
Faculties;
and be con-
clusive Evi-
dence of
Value, Popu-
lation, and
Distance.

[Sect. 10. "That for all the other purposes of this act the annual value of all benefices shall be the net annual value thereof, to be estimated in the same manner as is hereinbefore directed for the purpose of any such certificate as aforesaid; and that it shall be lawful for the court before whom any suit shall be depending for the recovery of any penalty or forfeiture under this act, and for any bishop acting under any of the provisions of this act, to make or cause to be made such inquiries and call for such evidence as such court or bishop shall think fit, and otherwise to proceed upon the best information which such court or bishop may be able to procure for estimating in manner aforesaid the annual value of any benefice; and with respect to the same, the decision of such court or of such bishop, founded on such evidence or other information, shall be final and conclusive, save when appealed from in due course of law."

In other
Cases how
annual Value
to be esti-
mated.

[Sect. 11. "That if any spiritual person, holding any cathedral preferment or benefice, shall accept any other cathedral preferment or benefice, and be admitted, instituted or licensed to the same contrary to the provisions of this act, every cathedral preferment or

Acceptance
of Preferment
contrary to
this Act
vacates the
former Pre-
ferment.

1 & 2 Vict.
c. 106.

benefice so previously held by him shall be and become *ipso facto* void, as if he had died or had resigned the same, any law, statute, canon, usage, custom or dispensation to the contrary notwithstanding; and if any spiritual person holding any two or more benefices shall accept any cathedral preferment, or any other benefice, or if any spiritual person holding two or more cathedral preferments shall accept any benefice, or if any spiritual person holding any cathedral preferment or preferments, and benefice or benefices, shall accept another benefice, he shall, before he is instituted, licensed, or in any way admitted to the said cathedral preferment or benefice, in writing under his hand, declare to the bishop or bishops within whose diocese or dioceses any of the cathedral preferments or benefices previously holden by him are situate, which cathedral preferment and benefice, or which two benefices (such two benefices being tenable together under the provisions of this act), he proposes to hold together, and a duplicate of such declaration shall by such spiritual person be transmitted to the registry of the diocese, and be there filed; and immediately upon any such spiritual person being instituted, licensed or in any way admitted to the cathedral preferment or benefice which he shall have accepted as aforesaid, such cathedral preferment or preferments, benefice or benefices as he previously held, and as he shall not as aforesaid have declared his intention to hold, or such benefice as shall not be tenable under the provisions of this act with such newly-accepted benefice, shall be and become *ipso facto* void, as if he had died or had resigned the same; and if such spiritual person shall in any such case refuse or wilfully omit to make such declaration as aforesaid, every cathedral preferment and benefice which he previously held shall be and become *ipso facto* void as aforesaid: Provided always, that nothing herein contained shall be construed to affect the provision hereinbefore made with respect to archdeacons, or with respect to spiritual persons holding, with any cathedral preferment, and with or without a benefice, offices in the same cathedral or collegiate church."

Present
Rights of
Possession
saved.

[Sect. 12. "That nothing hereinbefore contained shall be construed to prejudice or affect the right of possession in any cathedral preferment or benefice to which any spiritual person shall have been collated, admitted, instituted or licensed, or which shall have been otherwise granted to any spiritual person before the passing of this act, unless he shall, after the passing of this act, accept or take some cathedral preferment or benefice contrary to the provisions of this act."

Saving of
other Rights.

[Sect. 13. "That nothing in this act contained shall be construed to prevent any spiritual person possessed of one or more than one benefice at the time of the passing of this act, and to whom or in trust for whom the advowson of or the next presentation or nomination to any other benefice has been conveyed, granted or devised by any deed or will made before the twenty-third day of December, one-thousand eight-hundred and thirty-seven, from taking the said last-mentioned benefice, and holding together such benefice and any one such first-mentioned benefice (although the benefices to be held together be not within the limits or under the joint yearly value, nor the population thereof under the amount prescribed by this act), but so nevertheless that the said two benefices be such as might have been held together before the passing of this act by dispen-

sation duly granted and confirmed; and the bishop of the diocese in which such second or other benefice is situate, shall and may, after a licence or dispensation shall have been obtained by such spiritual person as is by this act required for holding two benefices together, admit, institute or license such spiritual person thereto, any thing herein contained to the contrary notwithstanding; unless such spiritual person after the passing of this act, and before he shall be so admitted, instituted or licensed to such second or other benefice as aforesaid, shall have accepted and taken any cathedral preferment or any other benefice, the holding of which with such second or other benefice would be contrary to the provisions of this act."

1 & 2 Vict.
c. 106.

[Since the passing of this statute the following form of dispensation has been adopted, which, it must be remembered, does not require the confirmation of the Great Seal.

[*Dispensation.—One Diocese.*

["—, by Divine Providence, Archbishop of Canterbury, Primate of all England, and Metropolitan, by authority of parliament, lawfully empowered for the purposes herein written. To our beloved in Christ, —, health and grace: Whereas it appears by the certificate under the hand of the Right Reverend Father in God —, by divine permission Lord Bishop of —, made and transmitted to us in pursuance of an act of parliament passed in the first and second years of the reign of her present Majesty, intituled "*An Act to abridge the holding of Benefices in Plurality, and to make better Provision for the Residence of the Clergy*," that the annual value of the —, in the county of —, and within his diocese, is —, and that the population thereof is — persons. And that the annual value of the —, in the county —, and diocese aforesaid, is —, and that the population thereof is — persons. And whereas it also appears by the said certificate that the distance of the said two benefices from each other is —: We therefore, being moved by your supplications in this behalf, and satisfied as well of your fitness, as of the expediency of allowing such two benefices to be holden together, do by virtue and in pursuance of the powers in us vested by the said act, graciously grant to you by these presents our licence or dispensation, that you may freely and lawfully hold together as long as you shall live the said — and the said —. Given under the seal of our Office of Faculties(x), at Doctors' Commons, this — day of —, in the year of our Lord one thousand eight hundred and —, and in the — year of our translation.

Forms of
Dispensation
under this
Act.

["(L.S.)

J. H. T. M. S., Reg."

[*Dispensation.—Two Dioceses.*

["—, by Divine Providence, Archbishop of Canterbury, Primate of all England, and Metropolitan, by authority of parliament, lawfully empowered for the purposes herein written. To our beloved in Christ, —, health and grace: Whereas it appears by the certificate under the hand of the Right Reverend Father in God —, by divine permission Lord Bishop of —, made and transmitted to us in pursuance of an act of parliament passed in the first and second years of the reign of her present Majesty, intituled "*An Act to abridge the holding of Benefices in Plurality, and to make better Provision for the Residence of the Clergy*," that the annual value of the —, in the county of —, and within his

(x) [See title *Notary Public.—Ed.*]

1 & 2 Vict.
c. 106.

diocese, is —, and that the population thereof is — persons. And whereas it appears by the certificate under the hand of the Right Reverend Father in God —, by divine permission Lord Bishop of —, also made and transmitted to us, in pursuance of the provisions of the said act, that the annual value of the —, in the county of —, and within his diocese, is —, and that the population thereof is — persons. And whereas it also appears by the said certificates that the distance of the said two benefices from each other is — : We therefore, being moved by your supplications in this behalf, and satisfied as well of your fitness, as of the expediency of allowing such two benefices to be holden together, do by virtue and in pursuance of the powers in us vested by the said act, graciously grant to you by these presents our licence or dispensation, that you may freely and lawfully hold together as long as you shall live the said — and the said —. Given under the seal of our Office of Faculties, at Doctors' Commons, this — day of —, in the year of our Lord one thousand eight hundred and —, and in the — year of our translation.

[“(L.S.)

J. H. T. M. S., Reg.”

[Sect. 14 contains a provision respecting certain former chaplains to the House of Commons.

[Sect. 15 to the end of sect. 27 contain provisions respecting the union of churches, which will be found under the title **Union**; and the other clauses of this statute will be found under the title **Residence**, with a few exceptions therein mentioned (y).

[For leases of pluralists, see title **Leases**, and for popish livings, see title **Popery**.

[The 3 & 4 Vict. c. 113 (the Dean and Chapter Act), gives by sects. 23, 51, the power of founding honorary canonries; and sect. 3 of 4 & 5 Vict. c. 39, provides as follows:—

Honorary
Preferment
may be held
with two
Benefices.
3 & 4 Vict.
c. 113, ss. 23,
51, and shall
not be sub-
ject to Lapse.

[“That the holding of an honorary canonry, or of any prebend, dignity or office, not now in any manner endowed, or whereof the lands, tithes, or other hereditaments, endowments or emoluments, shall have been vested in the Ecclesiastical Commissioners for England, or which may hereafter be endowed to an amount not exceeding twenty pounds by the year, shall not be construed to prevent the holding therewith of more benefices than one; and that no such prebend, dignity or office, which was vacant on the thirteenth day of August last, or became so at any time since, shall be deemed to have lapsed by reason of such vacancy, but hath remained and shall remain in the patronage of the archbishop or bishop of the diocese for the time being until a successor shall be collated thereto; and that every such prebend, dignity or office, which shall hereafter become vacant, and every such honorary canonry, shall in like manner be and remain in the patronage of the archbishop or bishop of the diocese for the time being until a successor shall be collated thereto; any royal prerogative, statute, canon, or usage to the contrary notwithstanding.”—ED.]

(y) [It had been intended (see title **Curate**, p. 94, vol. i.) to print this act at length under this title, but it has since been found more convenient to arrange its provisions in the manner stated in the text.—ED.]

Polygamy—See **Bigamy**.**Popery.**

1. <i>Papal Incroachments in this Realm</i>	141	<i>Papist and Protestant, by Popish Priest</i>	154
2. <i>Popish Jurisdiction abolished</i>	142	10. <i>Papists shall not succeed to the Crown of this Realm</i>	155
3. <i>Peter Pence abolished</i> . . .	146	11. <i>Papists shall not present to Benefices</i>	ib.
4. <i>First Fruits and Tenths taken from the Pope</i>	ib.	12. <i>Lands given to Superstitious Uses</i>	163
5. <i>The Pope's Presentation to Benefices</i>	147	13. <i>Summary of Laws against Papists before April, 1829.</i>	ib.
6. <i>Appeals to Rome</i>	148	14. <i>Roman Catholic Relief Acts since that period, and decisions thereupon</i>	169
7. <i>Bringing Bulls and other Instruments from Rome</i> . . .	150		
8. <i>Popish Books and Relics</i> . . .	151		
9. <i>Popish Marriage, and between two Protestants or</i>			

I. Papal Incroachments in this Realm (2).

1. **THERE** doth not appear much of the pope's power in this realm before the Conquest. But the pope having favoured and supported King William the First in his invasion of this kingdom, took that opportunity of enlarging his incroachments, and in this king's reign began to send his legates hither, and prevailed with Henry the First to give up the donation of bishoprics; and in the time of King Stephen gained the prerogative of appeals; and in the time of Henry the Second, exempted all clerks from the secular power (a).

2. And not long after this, by a general excommunication of the king and people, for several years, because they would not suffer an archbishop to be imposed upon them, King John was reduced to such straits, that he was obliged to surrender his kingdoms to the pope, and to receive them again to hold of him for the rent of a thousand marks (b).

3. And in the following reign of Henry the Third, partly from the profits of our best church benefices, which were generally given to Italians and others residing at the court of Rome, and partly from the taxes imposed by the pope, there went yearly out of the kingdom 70,000*l.*, an immense sum in those days (c).

4. The nation, being under this necessity, was obliged to provide for the prerogative of the prince and the liberties of

(2) [See prefatory remarks to titles **Church in Ireland** and **Church in Scotland**; and as to the Roman Catholic Church in Canada, see title

Church in the Colonies.—Ed.]

(a) 1 Hawk. 49, 50.

(b) Ibid. 50.

(c) Ibid.

the people by many strict laws, as will appear in the following sections (*d*).

The rigour of these laws has been much softened by the 31 Geo. 3, c. 32, in favour of such papists as shall qualify themselves in the manner prescribed by that act; but such as shall refuse or neglect to take and subscribe the oath and declaration therein mentioned (*e*), still remain liable to the penalties and inconveniences hereafter stated; some of which attach upon *popish recusants*, and some upon *popish recusants convict*.

II. *Popish Jurisdiction abolished.*

1. Art. 37. The Bishop of Rome hath no jurisdiction in this realm of England.

2. Canon 1. All ecclesiastical persons shall faithfully keep and observe, and (as much as in them lieth) shall cause to be observed and kept of others, all and singular laws and statutes made for restoring to the crown of this kingdom the ancient jurisdiction over the state ecclesiastical, and abolishing all foreign power repugnant to the same. And all ecclesiastical persons having cure of souls, and all other preachers and readers of divinity lectures shall to the utmost of their wit, knowledge and learning purely and sincerely, without any colour of dissimulation, teach, manifest, open and declare, four times a year at least, in their sermons and other collations and lectures, that all usurped and foreign power (forasmuch as the same hath no establishment nor ground by the law of God) is for most just causes taken away and abolished, and that therefore no manner of obedience or subjection is due unto any such foreign power.

3. By the 26 Hen. 8, c. 1, the king shall be taken as the only supreme head in earth of the Church of England, and shall have and enjoy annexed to the imperial crown of this realm, all honours, dignities, pre-eminences, jurisdictions, privileges, authorities, immunities, profits, and commodities to the said dignity of supreme head of the same church belonging; and shall have power from time to time to visit, repress, redress, reform, order, correct, restrain, and amend all such errors, heresies, abuses, offences, contempts, and enormities which by any spiritual authority may lawfully be reformed, repressed, ordered, redressed, corrected, restrained, or amended; any usage, custom, foreign laws, foreign authority, prescription, or any other thing to the contrary notwithstanding.

4. And by the 35 Hen. 8, c. 3, whereas the king hath heretofore been and is justly, lawfully, and notoriously known, named, published, and declared, to be King of England, France, and Ireland, defender of the Faith, and of the Church

(*d*) 1 Hawk. 50.

(*e*) *Vide Oaths.*

of England and also of Ireland in earth supreme head, and hath justly and lawfully used the title and name thereof, it is enacted that all his majesty's subjects shall from henceforth accept and take the same his majesty's style as it is declared and set forth in manner and form following, viz. "Henry the Eighth, by the Grace of God king of England, France, and Ireland, defender of the Faith, and of the Church of England and also of Ireland in earth the supreme head;" and the said style shall be for ever united and annexed to the imperial crown of this realm.

5. And by the 1 Eliz. c. 1, s. 16, to the intent "that all the usurped and foreign power and authority, spiritual and temporal, may for ever be clearly extinguished, and never to be used or obeyed within this realm, it is enacted that no foreign prince, person, prelate, state, or potentate, spiritual or temporal, shall at any time use, enjoy, or exercise any manner of power, jurisdiction, superiority, authority, pre-eminence, or privilege, spiritual or ecclesiastical, within this realm; but the same shall be clearly abolished for ever; any statute, ordinance, custom, constitutions, or any other matter or cause whatsoever to the contrary notwithstanding."

Sect. 17. "And such jurisdictions, privileges, superiorities, and pre-eminences, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority hath been heretofore or may lawfully be exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order and correction of the same, and of all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities, shall for ever be united and annexed to the imperial crown of this realm."

"And for the utter extinguishment of all foreign and usurped power and authority, it is enacted that if any person shall by writing, printing, teaching, preaching, express words, deed, or act, advisedly, maliciously, and directly affirm, hold, stand with, set forth, maintain, or defend the authority, pre-eminence, power, or jurisdiction, spiritual or ecclesiastical, of any foreign prince, prelate, person, state, or potentate whatsoever, heretofore claimed, used, or usurped within this realm; or shall advisedly, maliciously, and directly put in ure or execute any thing for the extolling, advancement, setting forth, maintenance, or defence of any such pretended or usurped jurisdiction, power, pre-eminence, and authority, or any part thereof; he, his abettors, aiders, procurers, and counsellors being thereof attainted according to the true order and course of the common laws of this realm, shall for the first offence forfeit to the king all his goods and chattels, as well real as personal; and if he have not goods worth 20*l*. he shall also be imprisoned for a year; and also all the ecclesiastical promo-

tions of every spiritual person so offending shall be void; for the second offence shall incur a *præmunire*; and for the third offence shall be guilty of high treason. But no person shall be molested for any offence by preaching, teaching, or words, unless he be indicted within one half-year. And no person shall be indicted or arraigned for any offence adjudged by this act, unless there be two sufficient witnesses or more to testify the offence; and the said witnesses, or so many of them as shall be living and within the realm at the time of the arraignment, shall be brought forth in person face to face to give evidence if the party require it. And if any person shall happen to give relief, aid, or comfort to a person offending in any such case of *præmunire* or treason, this shall not be taken to be an offence, unless there be two sufficient witnesses openly to testify that the person had notice and knowledge of the offence committed." Sections 27, 28, 29, 30, 31, 37, 38. And by the 23 Eliz. c. 1, s. 8, the justices of the peace may inquire of offences within this act (*but not hear and determine the same*), within a year and a day after the offence committed.

6. And by the 5 Eliz. c. 1 (which act is required to be read at every quarter sessions, leet and law day, and once in every term, in the open hall of every house of court and chancery), if any person shall by writing, printing, preaching, or teaching, deed, or act, advisedly and wittingly hold or stand with, extol, set forth, maintain, or defend the authority, jurisdiction, or power of the bishop of Rome, or of his see, heretofore claimed, used, or usurped within this realm, or by any speech, open deed or act, advisedly and wittingly attribute any such manner of jurisdiction, authority, or pre-eminence to the said bishop or see of Rome within this realm, he, his abettors, procurers, and counsellors, and also their aiders, assistants, and comforters, upon purpose and to the intent to set forth further and extol the said usurped power, being thereof lawfully indicted or presented within one year, and convicted or attainted at any time after, shall incur a *præmunire*: and as well justices of assize in their circuits, as justices of the peace in their quarter or open sessions, may inquire thereof as of other offences against the peace, and shall certify every presentment thereof into the King's Bench within forty days, if the term be then open; if not, at the first day of the full term next following the said forty days, on pain of 100*l.*; and the justices of the King's Bench shall hear and determine the same as in other cases of *præmunire*. And for the second offence, such person shall be guilty of high treason; but not to work corruption of blood, disherison of heirs, or forfeiture of dower: provided that the charitable giving of reasonable alms to any offender, without fraud or covin, shall not be deemed any such abatement, procuring,

counselling, aiding, assisting, or comforting, as thereby to incur any pain or forfeiture (e).

His Abettors, Procurers, and Counsellors, and also their Aiders, Assistants, and Comforters.—An indictment against any such person must be, *knowing* the principal to be a maintainer of the jurisdiction of the pope; and to say, *against the form of the statute* only, is not sufficient (f).

Charitable giving of reasonable Alms.—This special clause of giving alms not to make an aider or comforter, if the alms be reasonable and without covin, though the offender be not imprisoned nor under bail, seems to be but agreeable to the common law; and therefore it seems even by the common law, if a physician or surgeon minister help to an offender sick or wounded, though he knew him to be an

(e) [When Mr. Canning was Secretary of State for Foreign Affairs, the Pope sent a letter, announcing his accession to the pontificate to the King, and through his secretary, to Mr. Canning, who consulted the Attorney and Solicitor General, as to whether a reply to these letters would subject him to a *præmunire*, and received for answer the following opinion.

["Sir, — We have had the honour of receiving Mr. Planta's letter, stating that the Pope, having announced to his majesty his elevation to the pontifical throne, in a letter, of which Mr. Planta inclosed to us a copy, with a translation, accompanied by another letter from the Cardinal Secretary of State; and the question having therefore arisen, as to whether any answer should be returned by his majesty and his government to this notification, you had directed him to refer the same to us, confidentially, and to request we would favour you with our opinion whether, according to the law at present in existence, there is *præmunire* in such a correspondence with the Pope and Cardinal Secretary of State. In compliance with your request, we have carefully perused and considered the letters above referred to, and beg leave to state that, by the stat. 5 Eliz. c. 1, s. 2, advisedly and wittingly to attribute, by any speech, open deed, or act, any manner of jurisdiction, authority or pre-eminence to the see of Rome, or to any bishop of the same see, within this realm, subjects

a party, for the first offence, to the penalties of *præmunire*; and as the Pope, by virtue of his office, claims, as we conceive, authority, jurisdiction and pre-eminence over the whole Christian Church, and certainly over the Catholic Church in this realm; and, as by the letters, his elevation to the supreme pontificate is in terms announced, which, we apprehend, would be construed as importing such a claim, we are of opinion that any answer to these letters, which might be interpreted into an implied recognition of such a claim, might be considered as bringing the party, being a subject, writing or advising it, within the operation of the above statute. It is, we think, worthy of remark, that the legislature, by carefully adopting the title of Bishop of Rome, instead of that of Pope, in the various acts passed since the Reformation, seems anxiously to have avoided any such implied recognition.

["We further think, that the reference made in the Pope's letter to the Catholic Church in his Majesty's dominions, and the recommendation of the weal of that Church to his majesty, render caution upon this occasion particularly necessary.

["We have the honour to be, &c.
[(Signed) "R. GIFFORD,
"J. S. COPLEY."]

[See Mr. Canning's Speech on the Roman Catholic Question, March 6, 1827.—ED.]

(f) 1 H. H. 332.

offender even in treason, this makes him not a traitor, for it is done upon the account of common humanity; but it will be misprision of treason if he know it, and do not discover him (*g*).

7. Finally, by the 3 Jac. c. 4, ss. 22, 23, if any person shall, either upon the seas or beyond the seas, or in any other place within the king's dominions, put in practice to absolve, persuade, or withdraw any of his majesty's subjects from their natural obedience, or to reconcile them to the pope or see of Rome, or to any other prince, state, or potentate; or shall be willingly so absolved or withdrawn as aforesaid, or willingly reconciled, or shall promise obedience to any such pretended authority, prince, state, or potentate, he, his procurers and counsellors, aiders and maintainers, knowing the same, shall be guilty of high treason.

Sect. 24. But this shall not extend to any person who shall be reconciled to the pope or see of Rome (for and touching the point of so being reconciled only) that shall return into this realm, and thereupon within six days before the bishop of the diocese or two justices of the peace of the county where he shall arrive, submit himself and take the oaths (of allegiance and supremacy, 1 Will. sess. 1, c. 8); which oaths the said bishop or justices shall certify at the next sessions, on pain of 40*l*.

Sect. 25. And persons shall be tried for these offences at the assizes of that county, or in the King's Bench, and be there proceeded against as if the treason had been committed in the county where the person shall be taken.

III. *Peter-pence abolished.*

Peter-pence was an annual tribute of one penny paid at Rome out of every family at the feast of St. Peter (*h*).

And this Ina, the Saxon king, when he went in pilgrimage to Rome about the year 740, gave to the pope, partly as alms, and partly in recompense of a house erected in Rome for English pilgrims (*i*).

And this continued to be paid generally until the time of King Henry the Eighth, when it was enacted that from thenceforth no person shall pay any pensions, censes, portions, peter-pence, or any other impositions, to the use of the bishop or see of Rome (*k*).

IV. *First Fruits and Tenths taken from the Pope.*

First fruits, *annates*, or *primitiæ*, are the first fruits after the avoidance of every spiritual living for one whole year.

(*g*) 1 H. H. 332.

(*h*) Gibs. 87.

(*i*) God. 111, 356.

(*k*) 25 Hen. 8, c. 21.

These have been paid of very ancient time; for amongst the laws of King Ina, who began his reign in the year 712, there is an order for the payment thereof. But the pope did not obtain to have them appropriated to himself until after the reign of King Edward the First (*l*).

Tenths, decimæ, are the tenth part of the yearly value of all ecclesiastical livings. This payment was exacted from the clergy by the pope in the reign of King Edward the First, and was sometimes granted by the pope to the kings of this realm, especially for the aid of the holy land; but afterwards these tenths became wholly appropriated to the see of Rome (*m*).

But by the 26 Hen. 8, c. 3 (*n*), the revenues of the first fruits and tenths are for ever annexed to the imperial crown of this realm. (See *First Fruits and Tenths*.)

V. *The Pope's Presentation to Benefices.*

1. By the 25 Edw. 3, st. 6, if any reservation, collation, or provision be made by the court of Rome of any archbishopric, bishopric, dignity, or other benefice, in disturbance of the rightful donors, the king shall present for that time if such donors shall not themselves exercise their right: and if persons lawfully presented shall be disturbed by such provisors, then the said provisors, their procurators, executors, and notaries, shall be attached by their body, and brought in to answer, and if they be convict they shall abide in prison without bail, till they have made fine to the king, and gree to the party grieved, and before they be delivered, they shall make full renunciation, and find surety that they shall not attempt such things in time to come. And if they cannot be found, the exigent shall go against them.

2. By the 38 Edw. 3, st. 2, to cease the perils that shall happen, because of provisions of benefices, it is ordained that all persons obtaining such provisions shall be punished according to the aforesaid statute of the 25 Edw. 3, and they who cannot be attached if they appear not in two months, shall be punished according to the statute of provisors of the 27 Edw. 3, c. 1 (*hereafter following*.)

3. By the 12 Rich. 2, c. 15, no person shall pass or send out of the realm, without the king's licence, to provide for himself a benefice, on pain that such provisor shall be out of the king's protection, and the benefice to be void.

4. And by the 13 Rich. 2, st. 2, c. 2, if any shall accept a benefice contrary to the statute of the 25 Edw. 3, st. 6, he shall be banished out of the realm for ever, and his lands and goods forfeited to the king.

5. By the 3 Rich. 2, c. 3, no person shall take to ferm any

(*l*) 4 Inst. 120; God. Introd. 49;
Degge, p. 2, c. 15.

(*m*) 4 Inst. 120, 121.

(*n*) And also by 1 Eliz. c. 4.

benefice of an alien, without the king's licence; nor shall convey money out of the realm for such ferm, on pain of being punished as by the statute of provisors of the 27 Edw. 3.

6. And by the 7 Rich. 2, c. 12, if any alien shall purchase and occupy any benefice without the king's licence, he shall be comprised within the statute of the 3 Rich. 2, c. 3, and moreover shall incur the forfeitures of the 25 Edw. 3, st. 5, c. 22 (*that he shall be out of the king's protection.*)

7. And finally, by the 16 Rich. 2, c. 5, which is the famous statute called the Statute of *Præmunire*, if any shall purchase or pursue, in the court of Rome or elsewhere, any translation of any prelate out of the realm, or from one bishopric to another, he shall be put out of the king's protection, his lands and goods forfeit to the king, and shall be attached by his body if he may be found, and brought before the king and his council there to answer, or else process to be made against him by *præmunire facias*, as in other statutes of provisors.

Shall be put out of the King's Protection.—By these words, the persons attainted in a writ of *præmunire* are disabled to have any action or remedy by the king's law or the king's writs; for the law and the king's writs are the things whereby a man is protected and aided, so as he who is out of the king's protection is out of the aid and protection of the law (*o*).

VI. Appeals to Rome.

1. The statutes concerning the prohibition of appeals to Rome, are but declaratory of the ancient law of the realm (*p*).

2. The first attempt of any appeal to the see of Rome out of England was by Anselm, Archbishop of Canterbury, in the reign of William Rufus; and yet it took no effect (*q*).

And the same is opposed by the statutes following:

3. By the 27 Edw. 3, c. 1, called the statute of provisors, all the people of the king's liegeance, which shall draw any out of the realm in plea, whereof the cognizance pertaineth to the king's court, or of things whereof judgments be given in the king's court, or which do sue in any other court, to defeat or impeach the judgments given in the king's court, shall have a day containing the space of two months by warning to be made to them, to appear before the king and his council, or in his chancery, or before the king's justices of the one bench or the other, to answer to the king for the contempt. And if they come not at the day to be at the law, they, their procurators, attorneys, executors, notaries and maintainers, shall be put out of the king's protection, and their lands and goods forfeit to the king, and their bodies (wheresoever they may be found) shall be taken and imprisoned, and ransomed at the king's will: and upon the same a writ shall be made to take

(*o*) 3 Inst. 126.

(*p*) 4 Inst. 340, 341.

(*q*) 4 Inst. 341.

them by their bodies, and to seize their lands and goods into the king's hands; and if it be returned that they be not found, they shall be put in exigent and outlawed.

4. By the 38 Edw. 3, st. 2, to cease the perils that shall happen because of citations out of the court of Rome, upon causes whose cognizance pertaineth to the king's court, it is ordained, that all persons obtaining such citations shall be punished according to the statute of the 25 Edw. 3, st. 6; and they who cannot be attached, if they appear not in two months, shall be punished according to the aforesaid statute of provisors. And the king, clergy, and laity do mutually engage to stand by one another in defence of this act.

5. By the 13 Rich. 2, st. 2, c. 3, if any person shall bring or send into the realm any summons, sentences, or excommunications against any person for executing the statute of provisors, he shall be imprisoned, and forfeit his lands and goods, and incur the pain of life and member: and if any prelate make execution thereof, his temporalities shall be taken into the king's hands; and if any person of less estate than a prelate make such execution, he shall be imprisoned, and make fine and ransom by the discretion of the king's council.

6. By the statute of *præmunire*, 16 Rich. 2, c. 5, if any shall purchase or pursue, in the court of Rome or elsewhere, any processes, sentences of excommunication, bulls or instruments, against any persons executing judgments in the king's courts, or shall bring within the realm or receive the same, he shall be put out of the king's protection, his lands and goods forfeit to the king, and shall be attached by his body if he may be found, and brought before the king and his counsel there to answer, or else process to be made against him by *præmunire facias*, as in other statutes of provisors.

Or elsewhere.]—It hath been said, that suits in the ecclesiastical courts within this realm are within these words, if they concern matters, the cognizance whereof belongs to the common law; as where a bishop deprives an incumbent of a donative, or excommunicates a man for hunting in his parks (*r*).

But it seemeth that a suit in those courts, for a matter which appears not by the libel itself, but only by the defendant's plea or other matter subsequent, to be of temporal cognizance (as where a plaintiff libels for tithes, and the defendant pleads that they were severed from the nine parts, by which they became a lay fee), is not within the statute; because it appears not that either the plaintiff or the judge knew that they were severed (*s*).

7. Finally, by the 24 Hen. 8, c. 12, all causes testamentary, causes of matrimony, and divorces, rights of tithes,

(*r*) 1 Haw. 51.

(*s*) 1 Haw. 52.

oblations, and obventions (the knowledge whereof by the goodness of princes of this realm, and by the laws and custom of the same, appertaineth to the spiritual jurisdiction of this realm) shall be determined within the king's jurisdiction and authority, and not elsewhere; any foreign inhibitions, appeals, sentences, summons, citations, suspensions, interdictions, excommunications, restraints, judgments, or other process, or impediments whatsoever notwithstanding. And all spiritual persons shall and may use, minister, and execute all divine services, any foreign citations, processes, inhibitions, suspensions, interdictions, excommunications, or appeals touching any the causes aforesaid, from or to the see of Rome, or any other foreign prince or court, to the contrary notwithstanding: and if they shall, by the occasion thereof, refuse to minister the same, they shall be imprisoned for a year, and make fine and ransom at the king's pleasure.

And if any person, in any of the causes aforesaid, shall attempt to procure from the see of Rome or elsewhere, any foreign process or other the instruments above-mentioned, or execute any of the same, or do any thing to the hindrance of any process, sentence, judgment, or determination in any courts of this realm, for any the causes aforesaid; he, his fautors, comforters, abettors, procurers, executors and counsellors, shall incur a *præmunire*. [See title *Appeal*.]

VII. *Bringing Bulls and other Instruments from Rome.*

1. By the 25 Hen. 8, c. 21, if any person shall sue to the court or see of Rome for any licence, faculty, or dispensation, or put any of the same in execution, he shall incur a *præmunire*.

2. And by the 28 Hen. 8, c. 16, all bulls, breves, faculties, and dispensations, heretofore obtained of the see of Rome, shall be void; and shall not be pleaded in any court of this realm, on pain of *præmunire*.

Yet it hath been holden, that the alleging of an ancient bull in order to induce another principal matter, whereon to ground a title, without claiming any thing from the bull itself, is not within this statute (*t*).

3. By the 13 Eliz. c. 2, if any person shall use or put in ure any bull, writing or instrument, written or printed, of absolution or reconciliation obtained from the bishop of Rome or other person claiming authority by or from him; or shall take upon him, by colour thereof, to absolve or reconcile any person, or to grant or promise to any person any such absolution or reconciliation, by any speech, preaching, teaching, writing, or any other open deed; or shall willingly receive

(*t*) 1 Haw. 51.

and take any such absolution or reconciliation; or shall obtain from the bishop of Rome any manner of bull, writing, or instrument, written or printed, containing any thing, matter or cause whatsoever; or shall publish or by any means put in ure any such bull, writing or instrument; he, his procurers, abettors and counsellors to the fact, and committing of the said offence, being attainted according to the course of the laws of this realm, shall be adjudged guilty of high treason. And all aiders, comforters or maintainers of any the said offenders, after committing any the said offences, to the intent to set forth, uphold or allow the execution of the said usurped power, shall incur a *præmunire*.

And if any person, to whom any such absolution, reconciliation, bull, writing, or instrument shall be offered, moved, or persuaded to be used, put in ure or executed, shall conceal the same offer, motion or persuasion, and not disclose the same by writing or otherwise within six weeks to some of the privy council, he shall be guilty of misprision of high treason.

And the justice of the peace may inquire thereof (*but not hear and determine the same*) within a year and a day after the offence committed (*u*).

And if any justice of the peace to whom any the said offences shall be declared, do not within fourteen days signify the same to one of the privy council, he shall incur a *præmunire*.

VIII. *Popish Books and Relics.*

1. By the 3 & 4 Edw. 6, c. 10, all books called antiphoners, missals, grailes, processional, manuals, legends, pies, portuasses, primers in Latin and English, couchers, journals, ordinals, or other books or writings heretofore used for the service of the church, written or printed in the English or Latin tongue, other than such as shall be set forth by the king's majesty, shall be clearly and utterly abolished, extinguished, and forbidden for ever to be used or kept in this realm (*v*).

And if any person or body corporate that shall have in his or their custody any of the said books or writings, or any images of stone, timber, alabaster, or earth, graven, carved, or painted, which have been taken out of or stand in any church or chapel, and do not destroy the same images and every of them, and deliver every of the same books to the mayor, bailiff, constable, or churchwardens of the town where such books shall be, to be by them delivered over openly within

(*u*) 23 Eliz. c. 1, s. 8.

(*v*) [See the case of the *Parishioners of All Hallows, Barking*, tit. *Church*,

vol. i. p. 374, and Bishop Gibson's Appendix, vol. ii. p. 1465.—Ed.]

three months next following after such delivery, to the archbishop, bishop, chancellor, or commissary of the diocese, to the intent that they may cause them immediately after either to be openly burnt, or otherwise defaced and destroyed, [*he or they*] shall for every such book or books willingly retained forfeit to the king for the first offence twenty shillings, for the second four pounds, and for the third shall suffer imprisonment at the king's will.

And if any mayors, bailiffs, constables, or churchwardens, do not within three months after receipt of the same books deliver them to the archbishop, bishop, chancellor, or commissary; and if such archbishop, bishop, chancellor, or commissary do not, within forty days after receipt of such books, burn, deface, and destroy the same; every of them so offending shall forfeit to the king 40*l*. The one-half of all which forfeitures shall be to any of the subjects that will sue for the same.

And the justices of assize in their circuits, and justices of the peace in their general sessions, may enquire of, hear, and determine the same.

But nothing herein shall extend to any image or picture, set or graven upon any tomb, in any church, chapel, or churchyard, only for a monument of any king, prince, nobleman, or other dead person, which hath not been commonly reputed and taken for a saint.

Also, any person may use, keep, and have any primers in the English or Latin tongue, set forth by King Henry VIII., so that the sentences of invocation or prayer to saints be blotted or put out of the same.

2. By the 13 Eliz. c. 2, "If any person shall bring into the realm any token or thing called by the name of *Agnus Dei*, or any crosses, pictures, beads, or such like vain and superstitious things from the bishop or see of Rome, or from any person authorized or claiming authority from the said bishop of Rome to consecrate or hallow the same; and shall deliver, or cause or offer to be delivered the same, or any of them, to any subject of this realm, to be worn or used; he, and also every other person who shall receive the same to the intent to use and wear the same, shall incur a *præmunire*.

"Provided, that if any person to whom any such *Agnus Dei* or other the things aforesaid shall be offered to be delivered, shall apprehend the party offering the same, and bring him to the next justice of the peace, if he shall be able so to do; or for lack of such ability, shall within three days disclose the name of such person so offering the same, and his dwelling place or place of resort (which he shall endeavour himself to know by all the means he can), to the ordinary of the diocese or to a justice of the peace of the shire where such person to

whom such offer shall be made shall be resiant; and also if such person to whom such offer shall be made shall happen to receive any such *Agnus Dei* or other thing above remembered, and shall in one day next after such receipt deliver the same to a justice of the peace: in such case he shall not incur any danger or penalty.

“And if any justice of the peace, to whom any the said offences shall be declared, do not within fourteen days signify the same to one of the privy council, he shall incur a *præmunire*.”

3. By the 3 Jac. 1, c. 5, s. 25, “No person shall bring from beyond the seas, nor shall print, sell, or buy any popish primers, ladies’ psalters, manuals, rosaries, popish catechisms, missals, breviaries, portals, legends, and lives of saints, containing superstitious matter, printed or written in any language whatsoever, nor any other superstitious books printed or written in the English tongue, on pain of 40s. for every book, one-third to the king, one-third to him that shall sue, and one-third to the poor of the parish where such books shall be found, and the said books to be burned.”

Sect. 26. “And two justices of the peace (and mayors within cities and towns corporate) may search the houses and lodgings of every popish recusant convict, or of every person whose wife is a popish recusant convict, for popish books and relicks of popery; and if any altar, pix, beads, pictures, or such like popish relicks, or any popish book or books, shall be found in any of their custody, as in the opinion of the said justices (or mayor) shall be thought unmeet for such recusant to have or use, the same shall presently be defaced and burnt, if it be meet to be burned; and if it be a crucifix, or other relick of any price, the same to be defaced at the general quarter sessions of the peace in the county where the same shall be found, and the same so defaced to be restored to the owner.”

Note.—A *recusant*, in general, signifieth any person, whether papist or other, who refuseth to go to church and to worship God after the manner of the Church of England; a *popish recusant*, is a papist who so refuseth; and a *popish recusant convict*, is a papist legally convicted of such offence(t).

(t) [In the former editions of this work the following sections were inserted at length, which the recent Roman Catholic Relief Acts have rendered it unnecessary to reprint:—
ix. *Jesuits and Popish Priests*—referring to 27 Eliz. c. 2; 35 Eliz. c. 2; 3 Jac. 1, c. 5; 31 Geo. 3, c. 32. *Vide infra*, on this subject, sects. 28 to 39 of 10 Geo. 4, c. 7; sect. 4 of 2 & 3 Will. 4, c. 115.

x. *Saying or hearing Mass*—23 Eliz. c. 1; 3 Jac. 1, c. 5; 31 Geo. 3, c. 32.

xi. *Frequenting Conventicles*, — 1 Will. 3, c. 18; 31 Geo. 3, c. 32.

xii. *Foreign Education of Papists*—1 Jac. 1, c. 4; 3 Jac. 1, c. 5; 11 & 12 Will. 3, c. 4.

xiii. *Popish Children of Protestants*—25 Car. 2, c. 2; 31 Geo. 3, c. 32.

IX. *Popish Marriage.*

1. By the 3 Jac. 1, c. 5, s. 13, "Every man being a popish recusant convict, who shall be married otherwise than in some open church or chapel, and otherwise than according to the orders of the Church of England, by a minister lawfully authorized, shall be disabled to have any estate of freehold into any lands of his wife as tenant by courtesy; and every woman being a popish recusant convict, who shall be married in other form than as aforesaid, shall be disabled not only to claim any dower of the inheritance of her husband, or any jointure of the lands of her husband, but also of her widow's estate and frankbank in any customary lands whereof her husband died seised, and likewise be disabled to have any part of her husband's goods: And if any such man shall be married with any woman otherwise than as aforesaid, which woman shall have no lands whereof he may be entitled to be tenant by the courtesy, he shall forfeit 100*l.*, half to the king, and half to him that shall sue in any of the king's courts of record."

2. But by the 26 Geo. 2, c. 33, after March 25, 1754, if they shall be married anywhere in England, other than in a church or public chapel (unless by special licence from the Archbishop of Canterbury), or without publication of banns or licence, the marriage shall be void. And nothing in the 31 Geo. 3, c. 32, shall extend to repeal any part of 26 Geo. 2, c. 33, s. 12. [To the same effect was 33 Geo. 3 (*u*).

[The severe penalties formerly attached to the celebration of marriage by a papist between two protestants, or between a protestant and papist, are taken away by 3 & 4 Will. 4, c. 102 (*x*).—ED.]

xiv. *Popish Children of Papists*—
11 & 12 Will. 3, c. 4.

xv. *Papists not repairing to Church*
—1 Eliz. c. 2; 1 Will. 3, c. 18; 31
Geo. 3, c. 32; 3 Jac. 1, c. 4; 29
Eliz. c. 6; 1 Jac. 1, c. 4.

xvi. *Perverting others, or being per-
verted to Popery*—23 Eliz. c. 1.

xvii. *Entering into Foreign Service*
—3 Jac. 1, c. 4.

xviii. *Refusing the Oaths and Sub-
scriptions* — 7 Jac. 1, c. 6; 31
Geo. 3, c. 32; 13 Car. 2, st. 2, c.
1; 25 Car. 2, c. 2; 7 & 8 Will. 3,
c. 27; 1 Geo. st. 2, c. 13.

xix. *Armour and Ammunition* — 3
Jac. 1, c. 5; 1 Will. 3, c. 15.

xx. *Horses*—1 Will. 3, c. 15.

xxi. *Popish Baptism*—3 Jac. 1, c. 5.]

(*u*) [The former editions contained
the following sections:—

xxiii. *Popish Burial*—referring to 3
Jac. 1, c. 5; 31 Geo. 3, c. 32.

xxiv. *Heirs of Popish Recusants*—
1 Jac. 1, c. 4; 1 Will. 3, c. 8.

xxv. *Popish Wife Recusant convict*—
3 Jac. 1, c. 5; 7 Jac. 1, c. 6.

xxvi. *Popish Servants or Sojourners*
—3 Jac. 1, c. 4; 31 Geo. 3, c. 32.

xxvii. *Popish Schoolmasters*—23 Eliz.
c. 1; 1 Jac. 1, c. 4; 31 Geo. 3, c.
32. *Vide infra*, 2 & 3 Will. 4, c.
115, and decisions thereupon.—
ED.]

(*x*) [See title *Marriage*, vol. ii. p.
478, for the statute of 3 & 4 Will. 4,
c. 102.—ED.]

X. *Papists shall not succeed to the Crown of this Realm.*

1. By the 1 Will. 3, sess. 2, c. 2, s. 9, "Every person that shall be reconciled to or shall hold communion with the see or Church of Rome, or shall profess the popish religion, or shall marry a papist, shall be excluded and be for ever incapable to inherit, possess, or enjoy the crown and government of this realm; and in such case the people shall be absolved of their allegiance; and the crown shall descend to and be enjoyed by such person being a protestant, as should have inherited and enjoyed the same, in case the person so reconciled, holding communion, or professing or marrying as aforesaid, were naturally dead."

Sect. 10. "And every king and queen who shall come to and succeed to the imperial crown of this kingdom, shall on the first day of the meeting of the first parliament next after their coming to the crown, sitting on the throne in the house of peers in the presence of the lords and commons, or at their coronation before such person who shall administer the coronation oath at the time of their taking the said oath (which shall first happen), make and subscribe the declaration of the 30 Car. II.; but if he or she shall be under the age of twelve years, then every such king and queen shall make and subscribe the same at their coronation, or at the first day of the meeting of the first parliament as aforesaid, which shall first happen after such king or queen shall have attained the said age of twelve years."

2. And by the second article of the union (5 Ann. c. 8) of the kingdoms of England and Scotland, "All papists, and persons marrying papists, shall be excluded from, and for ever incapable to inherit, possess, or enjoy the imperial crown of Great Britain, and the dominions thereunto belonging; and in every such case, the crown and government shall descend to and be enjoyed by such person being a protestant, as should have inherited and enjoyed the same, in case such papist or person marrying a papist was naturally dead."

[See titles *Church in England and Ireland*, and *Church in Scotland*(y).—ED.]

XI. *Papists shall not present to Benefices.*

1. By the 3 Jac. 1, c. 5, s. 18, "Every person, being a *popish recusant convict*, shall be utterly disabled to present to any benefice with cure or without cure, prebend, or any other ecclesiastical living; or to collate or nominate to any free school,

(y) [In the former editions the following sections were also printed at length:—

xxix. *Papists shall not sit in either*

House of Parliament—referring to 30 Car. 2, st. 2, c. 1; 1 Geo. 1, st. 2, c. 13.]

hospital, or donative; or to grant any avoidance of any benefice, prebend, or other ecclesiastical living."

Sect. 19. "And the chancellors and scholars of the University of Oxford, so often as any of them shall be void, shall have the presentation, nomination, collation, and donation of and to every such benefice, prebend, or ecclesiastical living, school, hospital, and donative, in the counties of Oxford, Kent, Middlesex, Sussex, Surry, Hampshire, Berkshire, Buckinghamshire, Gloucestershire, Worcestershire, Staffordshire, Warwickshire, Wiltshire, Somersetshire, Devonshire, Cornwall, Dorsetshire, Herefordshire, Northamptonshire, Pembrokeshire, Caermarthenshire, Brecknockshire, Monmouthshire, Cardiganshire, Montgomeryshire, the city of London, and in every city and town being a county of itself within any of the limits and precincts of any of the counties aforesaid, as shall happen to be void during such time as the patron thereof shall be a recusant convict as aforesaid."

Sect. 20. "And the chancellor and scholars of the University of Cambridge shall have the presentation, nomination, collation, and donation of and to every such benefice, prebend, or ecclesiastical living, school, hospital, and donative within the counties of Essex, Hertfordshire, Bedfordshire, Cambridgeshire, Huntingdonshire, Suffolk, Norfolk, Lincolnshire, Rutlandshire, Leicestershire, Derbyshire, Nottinghamshire, Shropshire, Cheshire, Lancashire, Yorkshire, the county of Durham, Northumberland, Cumberland, Westmoreland, Radnorshire, Denbeshire, Flintshire, Carnarvonshire, Angleseyshire, Merionethshire, Glamorganshire, and in every city and town being a county of itself within the limits and precincts of any of the said counties, as shall happen to be void during such time as the patron thereof shall be a recusant convict as aforesaid."

Sect. 21. "Provided, that neither of the said chancellors nor scholars of either of the said universities shall present or nominate to any benefice with cure, prebend, or other ecclesiastical living, any such person as shall then have any other benefice with cure of souls; and if any such presentation or nomination shall be made of any such person so beneficed, the same shall be void."

Being a Popish Recusant convict.]—And this whether he be convicted before the avoidance or after; for the words are general, that the university shall present so often as any such benefices shall be void; and avoidances before conviction are within the same mischief as avoidances after; and it would be a hard construction that general words shall not be extended to remedy all cases which are within equal mischief (z).

Shall be utterly disabled.]—They were utterly disabled

(z) Comyns, 182; Gibs. 771.

before, by being made excommunicate, in sect. 2, as was observed by Finch, solicitor, in the case of *Knight v. Dauncer*; and therefore, of what force soever institution or induction, when given upon such a presentation, may be against *strangers*, there is no doubt but the bishop may refuse to give it, and take the benefit of the lapse, in case no other presents who hath right, and is capable of presenting. For that the bishop in this case, as in others, hath right to lapse, appears from hence, that the statute intended no more than to put the universities in the place of the patron, all rights which belong to others remaining as they were before (a).

To present.]—Hereby the patron is only disabled to present; and he continues patron as to all other purposes; and therefore he shall confirm the leases of the incumbent (b).

Or to grant an Avoidance.]—But such person, by being disabled to grant an avoidance, is no way hindered from granting the advowson itself in fee, or for life or years *bonâ fide*, and for good consideration (c).

And the Chancellor and Scholars.]—The two clauses which give this benefit to the universities respectively, are private clauses, whereof the judges, without pleading of them, cannot take notice (d).

So often as any of them shall be void.]—But if an advowson or avoidance, belonging to such a person, come into the king's hands, by reason of an outlawry, or conviction of recusancy, or the like, the king, and not the university, shall present (e).

During such Time as the Patron thereof shall be a Recusant convict.]—When the presentation for that turn is vested in the university, although afterwards the recusant conformeth himself, or dieth, yet the university shall present (f).

2. By the 1 Will. 3, c. 26, s. 2, “Every person who shall refuse or neglect to make and subscribe the declaration of the 30 Car. II. when the same shall be tendered by two justices of the peace as in the said act is mentioned; or who shall, upon notice given as by the said act, refuse or forbear to appear before them for the making and subscribing thereof, and shall thereupon have his name, surname, and place of abode certified and recorded at the sessions, every such person so recorded shall be from henceforth adjudged disabled to make such presentation, collation, nomination, donation, or grant of any avoidance of any benefice, prebend, or ecclesiastical living, as fully as if such person were a popish recusant convict. And the universities shall have the presentation, nomination, collation, and donation.”

Sect. 3. “And where any person shall be seised or possessed of any advowson, right of presentation, collation, or nomination

(a) Gibs. 771.

(b) 1 Haw. 32.

(c) Ibid.

(d) 10 Co. 57.

(e) 1 Haw. 32.

(f) 10 Co. 57.

to any such ecclesiastical living, free school, or hospital, as aforesaid, in trust for any papist or popish recusant, who shall be convicted or disabled, as by the 3 Jac. 1, c. 5, or by this act, he shall be disabled to present, nominate, or collate to any such ecclesiastical living, free school, or hospital, or to grant any avoidance thereof, and such presentations, nominations, collations, and grants shall be void; and the universities shall proceed as if such recusant convict or disabled were seised or possessed thereof."

Sect. 4. "And if any trustee or mortgagee, or grantee of any avoidance shall present, nominate, or collate, or cause to be presented, nominated, or collated, any person to any such ecclesiastical living, free school, or hospital, whereof the trust shall be for any recusant convict or disabled, without giving notice of the avoidance in writing to the vice-chancellor within three months next after the avoidance, he shall forfeit 500*l.* to the respective chancellor and scholars of the university to whom the presentation, nomination, or collation shall belong."

Sect. 5. "Provided, that the said chancellors and scholars of either university shall not present or nominate to any benefice with cure, prebend, or other ecclesiastical living, any person as shall then have any other benefice with cure of souls; and if any such presentment shall be had or made of any such person so beneficed, the same shall be utterly void."

Sect. 6. "And if any person so presented or nominated to any benefice with cure, shall be absent from the same above sixty days in any one year, in such case the said benefice shall be void."

Sect. 7. "Provided always, that if any such person shall present himself at the sessions for that place where his name was recorded, and shall there in open court make and subscribe the said declaration, and take the oaths (of allegiance and supremacy, 1 Will. 3, c. 8), he shall be discharged of the said disability, and be enabled to make such presentment, collation, nomination, donation, and grant, as if this act had not been made."

S. 2. *Refuse or forbear.*—In the case of *Fitzherbert v. The University of Oxford*, the party was summoned to take the oaths, but refused to attend. Upon which occasion it was declared by the court, that the judges ought to be present at the time appointed; and if they are not there, it is a good excuse for the party, if the party attends, but there is no necessity that the justices should be present, if the party does not come; it is sufficient if they leave notice at the place, to give them notice if the party comes; and the party himself is obliged to do the first act, namely, to attend at the time and place appointed (*g*).

3. And by the 12 Anne, stat. 2, c. 14, s. 1, it is further enacted, "That every papist or person making profession of the popish religion, and every child of such person not being a protestant under the age of twenty-one years, and every mortgagee, trustee or person, any way intrusted, directly or indirectly, mediately or immediately, by or for such papist or person making profession of the popish religion or such child as aforesaid, whether such trust be declared by writing or not, shall be disabled to present, collate and nominate to any benefice, prebend or ecclesiastical living, school, hospital or donative, or to grant any avoidance of any benefice, prebend or ecclesiastical living, and every presentment, collation, nomination and grant, and every admission, institution and induction thereupon shall be void; and the universities shall have the presentation, nomination, collation and donation."

Sect. 2. "And when any presentation to any benefice or ecclesiastical living shall be brought to any archbishop, bishop or other ordinary, from any person who shall be reputed to be, or whom such archbishop, bishop or other ordinary shall have cause to suspect to be a papist or trustee of any person making profession of the popish religion, or suspected to be such, such archbishop, bishop or other ordinary shall tender or administer to every such person (if present) the declaration against transubstantiation of the 25 Car. 2, and if absent, shall by notice in writing to be left at the place of habitation of such person, appoint some convenient time and place when and where such person shall appear before such archbishop, bishop or other ordinary, or some persons to be authorized by them, by commission under their seal of office, who shall, upon such appearance, tender or administer the said declaration to the party making such presentation; and if he shall neglect or refuse to make and subscribe the declaration so tendered, or shall neglect or refuse to appear upon such notice, such presentation shall be void; and in such case the archbishop, bishop or other ordinary shall, within ten days after such neglect or refusal, send and give a certificate under their seal of office, of such neglect or refusal to the vice-chancellor; and the presentation to such benefice, for that turn only, shall be vested in the respective chancellor and scholars."

Sect. 3. "And for the better discovery of secret trusts and fraudulent conveyances made by papists, it is enacted, that when the presentation of any person presented to any benefice or ecclesiastical living, shall be brought to any archbishop, bishop or other ordinary, he shall, before he give institution, examine the person presented upon oath, whether to the best and utmost of his knowledge and belief, the person who made such presentation be the true and real patron, or made the same in his own right, or whether he be not mediately or immediately, directly or indirectly, trustee or any way intrusted

for some other, and whom by name, who is a papist or maketh profession of the popish religion, or the children of such, or for any other and whom, or what he knows, has heard, or believes touching the same, and if such person so presented shall refuse to be examined, or shall not answer directly, the presentation shall be void."

Sect. 4. "And the chancellors and scholars of the respective universities, to whom the presentation to such benefices and ecclesiastical livings shall belong, in case the rightful patrons had been popish recusants convict, and their presentees or clerks, may, for the better discovery of such secret and fraudulent trusts, exhibit their bill in any court of equity, against such person presenting, and such person as they have reason to believe to be the *cestui que trust* of the advowson, or any other person whom they have cause to suspect, may be able to make any other or further discovery of such secret trust and practices, to which bill the defendants, being duly served with process of the court, shall forthwith directly answer; and if they shall refuse or neglect to answer, in such time as shall be appointed by the court, the bill shall be taken *pro confesso*, and be allowed as evidence against such person so neglecting and refusing, and his trustees, and his or their clerk; provided, that every person having fully answered such bill, and not knowing of any such trust, shall be entitled to his costs to be taxed according to the course of the court."

Sect. 5. "And the court where any *quare impedit* shall be depending, at the instance of the said chancellor and scholars, or their clerk, being plaintiffs or defendants in such suit, by motion in open court, may make a rule or order requiring satisfaction upon the oath of such patron and his clerk, who in the said suit shall contest the right of the university to present, by examination of them in open court, or by commission under the seal of such court for the examination of them, or by affidavit as the said court shall find most proper, in order to the discovery of any secret trusts, frauds or practices relating to the said presentation; and if it appear to the court, upon the examination of such patron or clerk, that the said patron is but a trustee, then they shall discover who the person is and where he lives, and upon their refusal to make such discovery, or to give satisfaction as aforesaid, they shall be punished as guilty of a contempt of the court; and if the said patron or his clerk shall discover the person for whom the said patron is a trustee, then the court, on a motion made in open court, shall make a rule or order, that the person for whom the patron is a trustee, shall, in the said court, or before commissioners to be appointed for that purpose under the seal of the said court, make and subscribe the declaration against transubstantiation of the 25 Car. 2, and likewise on pain of incurring a contempt of the said court, shall give such further satisfaction upon oath

relating to the said trust as the court shall think fit; and such person so required to make and subscribe the said declaration, and refusing or neglecting so to do, shall be esteemed as a popish recusant convict in respect of such presentation."

Sect. 6. "And the answer of such patron and the person for whom he is intrusted, and his and their clerk or any of them, and their examinations and affidavits taken as aforesaid by order of any court where such *quare impedit* shall be depending, or by any archbishop, bishop or other ordinary, or the commissioners as aforesaid, which examinations shall therefore be reduced into writing and signed by the party examined, shall be allowed as evidence against such patron so presenting and his clerk."

Sect. 7. "Provided, that no such bill, nor any discovery to be made by any answer thereunto, or to any such examination as aforesaid, shall be made use of to subject any person making such discovery or not answering such bill, to any penalty or forfeiture, other than the loss of the presentation then in question."

Sect. 8. "And in case of any such bill of discovery exhibited by the chancellor and scholars or their presentee, no lapse shall incur, nor plenarty be a bar against them, in respect of the benefice or ecclesiastical living touching which such bill shall be exhibited, till after three months from the time that the answer to such bill shall be put in, or the same be taken *pro confesso*, or the prosecution thereof deserted, provided that such bill be exhibited before any lapse incurred."

Sect. 9. "And the chancellor and scholars may sue a writ of *quare impedit* by the name of chancellor and scholars, or by their proper names of incorporation at their election."

Sect. 10. "And in case of any such trust confessed or discovered by any answer to such bill or such examination as aforesaid, the court may enforce the producing of the deeds relating to the said trusts, by such methods as they shall find proper."

4. And by the 11 Geo. 2, c. 17, s. 5, it is further enacted, "That every *grant* to be made of any advowson or right of presentation, collation, nomination or donation of and to any benefice, prebend or ecclesiastical living, school, hospital or donative, and every grant of any avoidance thereof, by any papist or person making profession of the popish religion, whether such trust be declared by writing or not, shall be null and void, unless such grant be made *bonâ fide* and for a full and valuable consideration to and for a protestant purchaser, and merely and only for the benefit of a protestant; and every such grantee or person claiming under any such grant shall be deemed to be a trustee for a papist or person professing the popish religion within the aforesaid act of 12 Anne; and all such grantees, and persons claiming under such grants, and their presentees, shall be compelled to make such discovery relating to such grants and presentations made thereupon, and

by such methods, as by the said act. And every *devise* to be made by any papist or person professing the popish religion, of any such advowson or right of presentation, collation, nomination or donation or any such avoidance, with intent to secure the benefit thereof to the heirs or family of such papist or person professing the popish religion, shall be null and void; and all such devises, and persons claiming under such devises, and their presentees, shall in like manner be compelled to discover, whether to the best of their knowledge and belief, such devises were not made to the said intent."

Where a Papist is Tenant in Common with a qualified Patron.

In Scotland, known or suspected Papists shall take the Formula before they present, otherwise the Presentation shall be void, and her Majesty &c. may present.

[But where a papist is seised of an advowson as tenant in common with another person who is not disqualified to present, the right of presentation is in such person alone; for the right of presentation is given to the universities by the foregoing statutes, only where one patron, or all who have the right of patronage, is or are disabled by professing the Roman Catholic religion, and not in the case where one papist patron is disabled and another patron is not (*h*). And as to Scotland, the 10 Anne, c. 13, enacts by sect. 7 as follows, "And whereas the right of patronage of churches may belong to papists, be it therefore enacted, That any person or persons, known or suspected to be papists, and who have a right of presenting ministers, shall be obliged, at or before his or their signing any presentation, to purge himself of popery, by taking and signing the formula contained in the third act of the parliament of Scotland, held in the year one thousand seven hundred, intituled 'An Act for preventing the Growth of Popery,' and in case such popish patron or patrons shall refuse to take and subscribe the formula aforesaid, the same being tendered to him or them by the sheriff of the shire, steward of the stewartry, or any two or more justices of the peace within their respective jurisdiction, who are hereby empowered to administer the same, the presentation, and the right of disposing the vacant stipends shall, for that time, belong to her majesty, her heirs and successors, who may present any qualified person or persons within six months after such neglect or refusal; any thing in this present act or any other act to the contrary notwithstanding (*i*)."

[All the provisions of this section are confirmed by ss. 8 and 16 of 10 Geo. 4, c. 7, *vide infra*, p. 169; and see title **Church in Scotland**.—ED.]

(*h*) [*Edwards v. Bishop of Exeter*, 5 Bing. N. C. 652, as to benefices in the presentation of papists in Scotland.—ED.]

(*i*) [There were inserted here in the former editions of this work the following Sections:—

xxxI. Shall be as excommunicated; referring to 3 Jac. 1, cc. 4 & 5.

xxxII. Shall not repair to Court —

3 Jac. 1, c. 5; 30 Car. 2, st. 2, c. 1; 31 Geo. 3, c. 32, s. 20.

xxxIII. Shall not come within Ten Miles of London — 3 Jac. 1, c. 5; 1 Will. 3, cc. 9 & 17; 30 Car. 2, st. 2, c. 1; 31 Geo. 3, c. 32.

xxxIV. Shall not remove above Five Miles from their Habitation — 35 Eliz. c. 2; 3 Jac. c. 5.

xxxV. Shall be disabled as to Law,

XII. *Lands given to Superstitious Uses*(j).

By the 1 Geo. 1, stat. 2, c. 50, s. 24, "All manors, lands, tenements, rents, tithes, pensions, portions, annuities, and all other hereditaments whatsoever, and all mortgages, securities, sums of money, goods, chattels, and estates, which have been given, granted, devised, bequeathed, or settled upon trust, or to the intent that the same, or the profits or proceeds thereof, shall be applied to any abbey, priory, convent, nunnery, college of Jesuits, seminary or school for the education of youth in the Romish religion in Great Britain or elsewhere, or to any other popish or superstitious uses, shall be forfeited to the king for the use of the public." This act was passed on account of the Rebellion in the year 1715, and commissioners were appointed to inquire of the estates, &c. (k) (l)

[XIII. *Summary of the Laws against Papists before April, 1829.*

["As to papists, (observes Mr. Justice Blackstone (m)), what has been said of the protestant dissenters would hold equally strong for a general toleration of them; provided their separation was founded only upon difference of opinion in religion, and their principles did not also extend to a subversion of the civil government. If once they could be brought to

Blackstone reasons against the Extension of Toleration to Papists.

Physic, and Offices — 3 Jac. c. 5; 7 & 8 Will. 3, c. 24; 1 Geo. 1, st. 2, c. 13; 25 Car. 2, c. 2; 31 Geo. 3, c. 32; 9 Geo. 2, c. 26. *Vide infra*, as to this exclusion from offices in Ecclesiastical Courts, sect. 16 of 10 Geo. 4, c. 7.

xxxvi (A). *Shall not be Executors, Administrators or Guardians* — 3 Jac. 1, c. 5.

xxxvi (B). *Papists, to enjoy Lands, must take and subscribe the Oath prescribed by* 18 Geo. 3, c. 60.

xxxvii. *Inrolling Deeds and Wills of Papists* — 3 Geo. 1, c. 18; 21 Geo. 3, c. 51; 31 Geo. 3, c. 32; 10 Geo. 1, c. 4.

xxxviii. *Registering Estates of Papists* — 1 Geo. 1, st. 2, cc. 13 & 55; 30 Car. 2; 3 Geo. 1, c. 18; 11 & 12 Will. 3, c. 4; 1 Jac. 1, c. 4; 31 Geo. 3, c. 32; 1 Geo. 1, st. 2, c. 55; 3 Geo. 1, c. 18; 35 Geo. 3, c. 99.

xxxix. *Papists to pay double Taxes,* — 31 Geo. 3, c. 32.]

(j) [In the case of *West v. Shuttleworth*, 2 Myl. & K. 684, the present Lord Chancellor (then Master of the Rolls) held a bequest to Roman Ca-

tholic priests, for the benefit of their prayers to the soul of testatrix, to be void, as contrary to the meaning, if not the letter, of 1 Edw. VI. against superstitious uses, *vide infra*, p. 180. —ED.]

(k) [*Vide infra*, the decisions on this subject, pp. 163—176.—ED.]

(l) [Here were inserted in the former editions of this work the following sections:—

xli. *Presentment of Papists to the Courts Spiritual and Temporal*; referring to 1 Can. 110; 2 Can. 114; 3 Jac. c. 4; 31 Geo. 3, c. 32.

xlii. *Information against Papists not restrained to the proper County*— 21 Jac. 1, c. 4.

xliii. *Peers, how to be tried in cases of Recusancy.*

xliv. *Papists conforming* — 1 Jac. 1, c. 4; 11 Geo. 2, c. 17; 31 Geo. 3, c. 32; Wilk. Can. v. 4, p. 660.

xlv. *Saving of the Ecclesiastical Jurisdiction*—31 Geo. 3, c. 32; 11 & 12 Will. 3, c. 4; 18 Geo. 3, c. 60; 31 Geo. 3, c. 32.

xlvi. *Summary of 31 Geo. 3, c. 32.]*

(m) [Comm. vol. iii.]

renounce the supremacy of the pope, they might quietly enjoy their seven sacraments, their purgatory, and auricular confession; their worship of relics and images; nay even their transubstantiation. But while they acknowledge a foreign power superior to the sovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good subjects.

The three
Classes of
Papists de-
fined, and the
Laws which
formerly af-
fected each
reviewed.

[“ Let us therefore now take a view of the laws in force against the papists; who may be divided into three classes,—persons professing popery, popish recusants convict, and popish priests. 1. Persons professing the popish religion, besides the former penalties for not frequenting their parish church, are disabled from taking their lands either by descent or purchase, after eighteen years of age, until they renounce their errors; they must at the age of twenty-one register their estates before acquired, and all future conveyances and wills relating to them; they are incapable of presenting to any advowson, or granting to any other person any avoidance of the same; they may not keep or teach any school under pain of perpetual imprisonment; and, if they willingly say or hear mass, they forfeit the one two hundred, the other one hundred marks, and each shall suffer a year’s imprisonment. Thus much for persons, who, from the misfortune of family prejudices or otherwise, have conceived an unhappy attachment to the Romish Church from their infancy, and publicly profess its errors. But if any evil industry is used to rivet these errors upon them, if any person sends another abroad to be educated in the popish religion, or to reside in any religious house abroad for that purpose, or contributes to their maintenance when there; both the sender, the sent, and the contributor, are disabled to sue in law or equity, to be executor or administrator to any person, to take any legacy or deed of gift, and to bear any office in the realm, and shall forfeit all their goods and chattels, and likewise all their real estate for life. And where these errors are also aggravated by apostacy or perversion, where a person is reconciled to the see of Rome, or procures others to be reconciled, the offence amounts to high treason. 2. Popish recusants, convicted in a court of law of not attending the service of the Church of England, are subject to the following disabilities, penalties and forfeitures, over and above those before mentioned. They are considered as persons excommunicated; they can hold no office or employment; they must not keep arms in their houses, but the same may be seized by the justices of the peace; they may not come within ten miles of London, on pain of 100*l.*; they can bring no action at law, or suit in equity; they are not permitted to travel above five miles from home, unless by licence, upon pain of forfeiting all their goods; and they may not come to court under pain of 100*l.* No

marriage or burial of such recusant, or baptism of his child, shall be had otherwise than by the ministers of the Church of England, under other severe penalties. A married woman, when recusant, shall forfeit two-thirds of her dower or jointure, may not be executrix or administratrix to her husband, nor have any part of his goods; and during the coverture may be kept in prison, unless her husband redeems her at the rate of 10*l.* a month, or the third part of all his lands. And lastly, as a *feme covert* recusant may be imprisoned, so all others must, within three months after conviction, either submit and renounce their errors, or, if required so to do by four justices, must abjure and renounce the realm: and if they do not depart, or if they return without the king's licence, they shall be guilty of felony, and suffer death as felons without benefit of clergy. There is also an inferior species of recusancy, refusing to make the declaration against popery enjoined by statute 30 Car.2, st. 2, when tendered by the proper magistrate, which, if the party resides within ten miles of London, makes him an absolute recusant convict; or, if at a greater distance, suspends him from having any seat in parliament, keeping arms in his house, or any horse above the value of five pounds. This is the state, by the laws now in being (*l*), of a lay papist. But, 3. The remaining species or degree, viz. popish priests, are in a still more dangerous condition. For by statute 11 & 12 Will. 3, c. 4, popish priests or bishops, celebrating mass or exercising any part of their functions in England, except in the houses of ambassadors, are liable to perpetual imprisonment. And by the statute 27 Eliz. c. 2, any popish priest, born in the dominions of the crown of England, who shall come over hither from beyond sea, unless driven by stress of weather and tarrying only a reasonable time (*m*), or shall be in England three days without conforming and taking the oaths, is guilty of high treason: and all persons harbouring him are guilty of felony without the benefit of clergy.

[“This is a short summary of the laws against the papists, under their three several classes, of persons professing the popish religion, popish recusants convict, and popish priests. Of which the President Montesquieu observes (*n*), that they are so rigorous, though not professedly of the sanguinary kind, that they do all the hurt that can possibly be done in cold blood. But in answer to this it may be observed, what foreigners who only judge from our statute book are not fully apprised of, that these laws are seldom exerted to their utmost rigour; and, indeed, if they were, it would be very difficult to

The original Enactment of those Laws defended; the propriety of softening their rigour considered.

(*l*) [Stat. 23 Eliz. c. 1; 27 Eliz. c. 2; c. 55; 3 Geo. 1, c. 18; 12 Geo. 2, 29 Eliz. c. 6; 35 Eliz. c. 2; 1 Jac. 1, c. 17.]

c. 4; 3 Jac. 1, c. 4 & 5; 7 Jac. 1, c. 6; 3 Car. 1, c. 3; 25 Car. 2, c. 2; 30 Car. 2, st. 2; 1 Will. & Mar. c. 9, 15, & 26; 11 & 12 Will. 3, c. 4; 12 Ann. st. 2, c. 14; 1 Geo. 1, st. 2, (m) [Sir Simon Clark's case, Latch, 1. He kept a Jesuit in his house for a week, knowing him to be a Jesuit. —Ed.]

(n) [Sp. L. b. 19, c. 27.]

excuse them. For they are rather to be accounted for from their history, and the urgency of the times which produced them, than to be approved, upon a cool review, as a standing system of law. The restless machinations of the Jesuits during the reign of Elizabeth, the turbulence and uneasiness of the papists under the new religious establishment, and the boldness of their hopes and wishes for the succession of the Queen of Scots, obliged the parliament to counteract so dangerous a spirit by laws of a great, and then perhaps necessary, severity. The powder-treason, in the succeeding reign, struck a panic into James I., which operated in different ways: it occasioned the enacting of new laws against the papists; but deterred him from putting them in execution. The intrigues of Queen Henrietta in the reign of Charles the First, the prospect of a popish successor in that of Charles the Second, the assassination-plot in the reign of King William, and the avowed claim of a popish pretender to the crown in that and subsequent reigns, will account for the extension of these penalties at those several periods of our history. But if a time should ever arrive, and perhaps it is not very distant, when all fears of a pretender shall have vanished, and the power and influence of the pope shall become feeble, ridiculous, and despicable, not only in England but in every kingdom of Europe; it probably would not then be amiss to review and soften these rigorous edicts; at least till the civil principles of the Roman Catholics called again upon the legislature to renew them: for it ought not to be left in the breast of every merciless bigot to drag down the vengeance of these occasional laws upon inoffensive, though mistaken subjects; in opposition to the lenient inclinations of the civil magistrate, and to the destruction of every principle of toleration and religious liberty.

How far those
Laws had
been miti-
gated by 18
Geo. 3, c. 60.

[“This hath partly been done by statute 18 Geo. 3, c. 60, with regard to such papists as duly take the oath therein prescribed, of allegiance to his majesty, abjuration of the Pretender, renunciation of the pope’s civil power, and abhorrence of the doctrines of destroying and not keeping faith with heretics, and deposing or murdering princes excommunicated by authority of the see of Rome: in respect of whom only, the statute of 11 & 12 Will. 3 is repealed, so far as it disables them from purchasing or inheriting, or authorizes the apprehending or prosecuting the popish clergy, or subjects to perpetual imprisonment either them or any teachers of youth (o).”

[Upon these statutes against papists, before they were mitigated by the 18 Geo. 3, Lord Mansfield observes, that they were thought, when they passed, necessary to the safety of the state, and are defensible on no other ground; and that the political object which the legislature had in view was to take from the Roman Catholics that weight and influence which is naturally connected with landed property, beyond what personal

(o) [Bl. Com. by Hov. & Ryl. 55—58.]

estate can give (*p*). Their effect is thus emphatically described by Mr. Burke (*q*) (writing probably in the year 1765), "Ireland is at this hour full of penalties and full of papists."

[By the nineteenth section of the 31 Geo. 3, c. 32, s. 13, it was provided that nothing contained in it should make "it lawful to found, endow or establish any religious order or society of persons bound by monastic or religious vows; or to found, endow or establish any school, academy or college, by persons professing the Roman Catholic religion within these realms or the dominions thereunto belonging; and that all uses, trusts and dispositions, whether of real or personal property, which immediately before the twenty-fourth day of June, 1791, should be deemed to be superstitious or unlawful, should continue to be so deemed and taken." Courts of Equity both before and after this act have held a disposition for the purpose of bringing up and educating children in the Roman Catholic religion in England to be clearly unlawful, and refused to carry it into effect (*r*). And it would seem to be equally illegal by the law of Ireland (*s*). *Vide infra*, p. 176.]

How far mitigated by 31 Geo. 3, c. 32.

[The next statute was the 43 Geo. 3, c. 30, the provisions of which, in fact, rendered the removal of the remaining disqualifications a matter of certainty at no distant period. By it all the severe and cruel restrictions and penalties enumerated by the learned judge, are removed from those Roman Catholics who are willing to comply with the requisitions of that statute, which are, that they must appear at some of the courts of Westminster, or at the quarter sessions held for the county, city or place where they shall reside, and shall make and subscribe a declaration, that they profess the Roman Catholic religion, and also an oath which is exactly similar to that required by the 18 Geo. 3, c. 60. Of this declaration and oath being duly made by any Roman Catholic, the officer of the court shall grant him a certificate; and such officer shall yearly transmit to the privy council lists of all persons who have thus qualified themselves within the year in his respective court. The statute then provides, "that a Roman Catholic thus qualified, shall not be prosecuted under any statute for not repairing to a parish church, nor shall he be prosecuted for being a papist, nor for attending or performing mass or other ceremonies of the Church of Rome; provided that no place shall be allowed for an assembly to celebrate such worship until it is certified to the session, nor shall any minister officiate in it until his name and description are recorded there. And no

And by 43 Geo. 3, c. 30.

(*p*) Cowp. 466; *Foone v. Blount*, Trin. 16 G. 3.

(*q*) [See Tracts relative to the Laws against Popery in Ireland, vol. ix. of Burke's Works.]

(*r*) [*Cary v. Abbot* (Sir W. Grant), 7 Ves. 490.]

(*s*) [*Att. Gen. v. Power*, 1 Ball & Beatty, 145; and the Irish statutes therein cited: *Jack dem. M'Guirk v. Reilly*, 2 Hudson & Brooke, 301.—Ed.]

Provisions of
43 Geo. 3,
c. 30.

such place of assembly shall have its doors locked or barred during the time of meeting or divine worship."

[And if any Roman Catholic whatever is elected constable, churchwarden, overseer, or into any parochial office, he may execute the same by a deputy, to be approved as if he were to act for himself as principal. But every minister who has qualified, shall be exempt from serving upon juries, and from being elected into any parochial office. And all the laws for frequenting divine service on Sundays shall continue in force, except where persons attend some place of worship allowed by this statute or the Toleration Act of the dissenters, 1 Will. & M.

[And if any person disturb a congregation allowed under this act, he shall, as for disturbing a dissenting meeting, be bound over to the next sessions, and upon conviction there shall forfeit twenty pounds.

[But no Roman Catholic minister shall officiate in any place of worship having a steeple and a bell, or at any funeral in a church or churchyard, or shall wear the habits of his order, except in a place allowed by this statute, or in a private house, where there shall not be more than five persons besides the family. This statute shall not exempt Roman Catholics from the payment of tithes, or other dues, to the church; nor shall it affect the statutes concerning marriages, or any law respecting the succession to the crown. No person who has qualified shall be prosecuted for instructing youth, except in an endowed school, or a school in one of the English universities; and except also, that no Roman Catholic schoolmaster shall receive into his school the child of any protestant father; nor shall any Roman Catholic keep a school until his or her name be recorded as a teacher at the sessions.

[But no religious order is to be established; and every endowment of a school or college by a Roman Catholic shall still be superstitious and unlawful. And no person henceforth shall be summoned to take the oath of supremacy, and the declaration against transubstantiation. Nor shall Roman Catholics who have qualified be removable from London and Westminster; neither shall any peer who has qualified be punishable for coming into the presence or palace of the king or queen. And no papists whatever shall be any longer obliged to register their names and estates, or enrol their deeds and wills. And every Roman Catholic who has qualified may be permitted to act as a barrister, attorney and notary.

[After the union of Great Britain and Ireland, the removal of the remaining disqualifications from Roman Catholics, the chief of which was their ineligibility as members of parliament, became the subject of frequent debate in both houses of parliament. The advocates for their removal triumphed on several occasions in the House of Commons (s), but never

(s) [In 1813 the question was carried by its largest majority, 159, when brought forward by Mr. Grattan. See the speeches of Messrs. Grattan,

in the House of Lords till the year 1829, when all civil disabilities (except the few which are specified in sections 12, 15, 16, 17, 18 of the first of the following statutes) were repealed.

[XIV. *Roman Catholic Relief Acts.*

[The 10 Geo. 4, c. 7, intituled "An Act for the Relief of His Majesty's Roman Catholic Subjects," which was passed on the 13th April, 1829, enacted as follows :

[" WHEREAS by various acts of parliament certain restraints and disabilities are imposed on the Roman Catholic subjects of his majesty, to which other subjects of his majesty are not liable : and whereas it is expedient that such restraints and disabilities shall be from henceforth discontinued : and whereas by various acts certain oath and certain declarations, commonly called the declaration against transubstantiation, and the declaration against transubstantiation and the invocation of saints and the sacrifice of the mass, as practised in the Church of Rome, are or may be required to be taken, made, and subscribed by the subjects of his majesty, as qualifications for sitting and voting in parliament, and for the enjoyment of certain offices, franchises, and civil rights : be it enacted, &c. that from and after the commencement of this act all such parts of the said acts as require the said declarations, or either of them, to be made or subscribed by any of his majesty's subjects, as a qualification for sitting and voting in parliament, or for the exercise or enjoyment of any office, franchise, or civil right, be and the same are (save as hereinafter provided and excepted) hereby repealed."

Provisions of
10 Geo. 4,
c. 7.

Acts relating
to Declara-
tions against
Transubstan-
tiation re-
pealed.

[Sect. 2. "That from and after the commencement of this act it shall be lawful for any person professing the Roman Catholic religion, being a peer, or who shall after the commencement of this act be returned as a member of the House of Commons, to sit and vote in either house of parliament respectively, being in all other respects duly qualified to sit and vote therein, upon taking and subscribing the following oath, instead of the oaths of allegiance, supremacy, and abjuration :

Roman Ca-
tholics may
sit and vote in
Parliament,
on taking the
following
Oath.

[" 'I A. B. do sincerely promise and swear, that I will be faithful and bear true allegiance to his majesty King George the Fourth, and will defend him to the utmost of my power against all conspiracies and attempts whatever, which shall be made against his person, crown, or dignity ; and I will do my utmost endeavour to disclose and make known to his majesty, his heirs and successors, all treasons and traitorous conspiracies which may be formed against him or them : and I do faithfully promise to maintain, support, and defend, to the utmost of my power, the succession of the crown, which succession, by an act, intituled, 'An Act for the further Limitation of the Crown, and better securing the Rights and Liberties of the Subject,' is and stands limited to the Princess

Plunkett, and Canning, and of Lords Grenville and Wellesley, in Hansard's Parliamentary Debates. The speech of Mr. Canning (30th April, 1822) on bringing in a bill for restoring to Roman Catholic *peers* their seats in

parliament, of which they were deprived by 30 Car. 2, contains an admirable historical summary of the origin and growth of the penal laws against papists.—Ed.]

10 Geo. 4,
c. 7.

Sophia, Electress of Hanover, and the heirs of her body, being protestants ; hereby utterly renouncing and abjuring any obedience or allegiance unto any other person claiming or pretending a right to the crown of this realm : and I do further declare, that it is not an article of my faith, and that I do renounce, reject, and abjure the opinion, that princes excommunicated or deprived by the pope or any other authority of the see of Rome, may be deposed or murdered by their subjects, or by any person whatsoever : and I do declare, that I do not believe that the pope of Rome, or any other foreign prince, prelate, person, state, or potentate hath or ought to have any temporal or civil jurisdiction, power, superiority, or pre-eminence, directly or indirectly, within this realm. I do swear, that I will defend to the utmost of my power the settlement of property within this realm, as established by the laws : and I do hereby disclaim, disavow, and solemnly abjure any intention to subvert the present church establishment, as settled by law within this realm : and I do solemnly swear, that I never will exercise any privilege to which I am or may become entitled, to disturb or weaken the Protestant religion or Protestant government in the United Kingdom. And I do solemnly, in the presence of God, profess, testify, and declare, that I do make this declaration, and every part thereof, in the plain and ordinary sense of the words of this oath, without any evasion, equivocation, or mental reservation whatsoever.

‘ So help me God.’ ”

The Name of
the Sovereign
for the Time
being to be
used in the
Oath.

[Sect. 3. “ That wherever, in the oath hereby appointed and set forth, the name of his present majesty is expressed or referred to, the name of the sovereign of this kingdom for the time being, by virtue of the act for the further limitation of the crown and better securing the rights and liberties of the subject, shall be substituted from time to time, with proper words of reference thereto.”

No Roman
Catholic ca-
pable of sit-
ting or voting
until he has
taken the
Oath.

[Sect. 4. “ That no peer professing the Roman Catholic religion, and no person professing the Roman Catholic religion, who shall be returned a member of the House of Commons after the commencement of this act, shall be capable of sitting or voting in either house of parliament respectively, unless he shall first take and subscribe the oath hereinbefore appointed and set forth, before the same persons, at the same times and places, and in the same manner as the oaths and the declaration now required by law are respectively directed to be taken, made, and subscribed ; and that any such person professing the Roman Catholic religion, who shall sit or vote in either house of parliament, without having first taken and subscribed, in the manner aforesaid, the oath in this act appointed and set forth, shall be subject to the same penalties, forfeitures, and disabilities, and the offence of so sitting or voting shall be followed and attended by and with the same consequences, as are by law enacted and provided in the case of persons sitting or voting in either house of parliament respectively, without the taking, making, and subscribing the oaths and the declaration now required by law.”

Roman Ca-
tholics may
vote at Elec-
tions, and be
elected, upon
taking the
Oath.

[Sect. 5. “ That it shall be lawful for persons professing the Roman Catholic religion to vote at elections of members to serve in parliament for England and for Ireland, and also to vote at the elections of representative peers of Scotland and of Ireland, and to

be elected such representative peers, being in all other respects duly qualified, upon taking and subscribing the oath hereinbefore appointed and set forth, instead of the oaths of allegiance, supremacy, and abjuration, and instead of the declaration now by law required, and instead also of such other oath or oaths as are now by law required to be taken by any of his majesty's subjects professing the Roman Catholic religion, and upon taking also such other oath or oaths as may now be lawfully tendered to any persons offering to vote at such elections."

10 Geo. 4,
c. 7.

[Sect. 6. "That the oath hereinbefore appointed and set forth shall be administered to his majesty's subjects professing the Roman Catholic religion, for the purpose of enabling them to vote in any of the cases aforesaid, in the same manner, at the same time, and by the same officers or other persons as the oaths for which it is hereby substituted are or may be now by law administered; and that in all cases in which a certificate of the taking, making, or subscribing of any of the oaths or of the declaration now required by law is directed to be given, a like certificate of the taking or subscribing of the oath hereby appointed and set forth shall be given by the same officer or other person, and in the same manner as the certificate now required by law is directed to be given, and shall be of the like force and effect."

Oath shall be administered in the same manner as former Oaths.

[Sect. 7. "That in all cases where the persons now authorized by law to administer the oaths of allegiance, supremacy, and abjuration to persons voting at elections, are themselves required to take an oath previous to their administering such oaths, they shall, in addition to the oath now by them taken, take an oath for the duly administering the oath hereby appointed and set forth, and for the duly granting certificates of the same."

Persons administering Oaths at Elections to take an Oath duly to administer.

[Sect. 8. "And whereas in an act of the parliament of Scotland made in the eighth and ninth session of the first parliament of King William the Third, intituled 'An Act for the preventing the Growth of Popery,' a certain declaration or formula is therein contained, which it is expedient should no longer be required to be taken and subscribed: be it therefore enacted, that such parts of any acts as authorize the said declaration or formula to be tendered, or require the same to be taken, sworn, and subscribed, shall be and the same are hereby repealed, except as to such offices, places, and rights as are hereinafter excepted; and that from and after the commencement of this act it shall be lawful for persons professing the Roman Catholic religion to elect and be elected members to serve in parliament for Scotland, and to be enrolled as freeholders in any shire or stewartry of Scotland, and to be chosen commissioners or delegates for choosing burgesses to serve in parliament for any districts or burghs in Scotland, being in all other respects duly qualified, such persons always taking and subscribing the oath hereinbefore appointed and set forth, instead of the oaths of allegiance and abjuration as now required by law, at such time as the said last-mentioned oaths, or either of them, are now required by law to be taken."

So much of any Acts as require the Formula contained in 8 & 9 W. 3, c. 3 (S.), to be tendered or taken, repealed.

Roman Catholics may elect and be elected Members for Scotland.

[Sect. 9. "That no person in holy orders in the Church of Rome shall be capable of being elected to serve in parliament as a member of the House of Commons; and if any such person shall be elected to serve in parliament as aforesaid, such election shall be void;

No Roman Catholic Priest to sit in the House of Commons.

10 Geo. 4,
c. 7.

and if any person, being elected to serve in parliament as a member of the House of Commons, shall, after his election, take or receive holy orders in the Church of Rome, the seat of such person shall immediately become void ; and if any such person shall, in any of the cases aforesaid, presume to sit or vote as a member of the House of Commons, he shall be subject to the same penalties, forfeitures, and disabilities as are enacted by an act passed in the forty-first year of the reign of King George the Third, intituled ‘ An Act to remove Doubts respecting the Eligibility of Persons in Holy Orders to sit in the House of Commons ;’ and proof of the celebration of any religious service by such person, according to the rites of the Church of Rome, shall be deemed and taken to be *prima facie* evidence of the fact of such person being in holy orders, within the intent and meaning of this act.”

Roman Catholics may hold Civil and Military Offices under his Majesty, with certain Exceptions.

[Sect. 10. “ That it shall be lawful for any of his majesty’s subjects professing the Roman Catholic religion to hold, exercise, and enjoy all civil and military offices and places of trust or profit under his majesty, his heirs or successors, and to exercise any other franchise or civil right, except as hereinafter excepted, upon taking and subscribing, at the times and in the manner hereinafter mentioned, the oath hereinbefore appointed and set forth, instead of the oaths of allegiance, supremacy, and abjuration, and instead of such other oath or oaths as are or may be now by law required to be taken for the purpose aforesaid by any of his majesty’s subjects professing the Roman Catholic religion.”

Not to exempt Roman Catholics from taking any other Oaths required.

[Sect. 11. “ That nothing herein contained shall be construed to exempt any person professing the Roman Catholic religion from the necessity of taking any oath or oaths, or making any declaration, not hereinbefore mentioned, which are or may be by law required to be taken or subscribed by any person on his admission into any such office or place of trust or profit as aforesaid.”

Offices withheld from Roman Catholics.

[Sect. 12. “ That nothing herein contained shall extend or be construed to extend to enable any person or persons professing the Roman Catholic religion to hold or exercise the office of guardians and justices of the united kingdom, or of regent of the united kingdom, under whatever name, style, or title such office may be constituted ; nor to enable any person, otherwise than as he is now by law enabled to hold or enjoy the office of lord high chancellor, lord keeper, or lord commissioner of the great seal of Great Britain or Ireland ; or the office of lord lieutenant, or lord deputy, or other chief governor or governors of Ireland ; or his majesty’s high commissioner to the general assembly of the Church of Scotland.”

Nothing herein to repeal 7 Geo. 4, c. 72.

[Sect. 13. “ That nothing herein contained shall be construed to affect or alter any of the provisions of an act passed in the seventh year of his present majesty’s reign, intituled ‘ An Act to consolidate and amend the Laws which regulate the Levy and Application of Church Rates and Parish Cesses, and the Election of Churchwardens, and the Maintenance of Parish Clerks in Ireland.’ ”

Roman Catholics may be Members of Lay Corporations.

[Sect. 14. “ That it shall be lawful for any of his majesty’s subjects professing the Roman Catholic religion, to be a member of any lay body corporate, and to hold any civil office or place of trust or profit therein, and to do any corporate act, or vote in any corporate election or other proceeding, upon taking and subscribing

the oath hereby appointed and set forth, instead of the oaths of allegiance, supremacy, and abjuration ; and upon taking also such other oath or oaths as may now by law be required to be taken by any persons becoming members of such lay body corporate, or being admitted to hold any office or place of trust or profit within the same."

10 Geo. 4,
c. 7.

[Sect. 15. " That nothing herein contained shall extend to authorize or empower any of his majesty's subjects professing the Roman Catholic religion, and being a member of any lay body corporate, to give any vote at, or in any manner to join in the election, presentation, or appointment of any person to any ecclesiastical benefice whatsoever, or any office or place belonging to or connected with the United Church of England and Ireland, or the Church of Scotland, being in the gift, patronage, or disposal of such lay corporate body."

Such Mem-
bers of Cor-
porations not
to vote in
Ecclesiastical
Appoint-
ments.

[Sect. 16. " That nothing in this act contained shall be construed to enable any persons, otherwise than as they are now by law enabled, to hold, enjoy, or exercise any office, place, or dignity of, in, or belonging to the United Church of England and Ireland, or the Church of Scotland, or any place or office whatever of, in, or belonging to any of the ecclesiastical courts of judicature of England and Ireland respectively, or any court of appeal from or review of the sentences of such courts, or of, in, or belonging to the commissary court of Edinburgh, or of, in, or belonging to any cathedral or collegiate or ecclesiastical establishment or foundation ; or any office or place whatever of, in, or belonging to any of the universities of this realm ; or any office or place whatever, and by whatever name the same may be called, of, in, or belonging to any of the colleges or halls of the said universities, or the colleges of Eton, Westminster, or Winchester, or any college or school within this realm ; or to repeal, abrogate, or in any manner to interfere with any local statute, ordinance, or rule, which is or shall be established by competent authority within any university, college, hall, or school, by which Roman Catholics shall be prevented from being admitted thereto, or from residing or taking degrees therein : provided also, that nothing herein contained shall extend or be construed to extend to enable any person, otherwise than as he is now by law enabled, to exercise any right of presentation to any ecclesiastical benefice whatsoever ; or to repeal, vary, or alter in any manner the laws now in force in respect to the right of presentation to any ecclesiastical benefice."

Not to ex-
tend to Of-
fices, &c. in
the Establish-
ed Church,
Ecclesiastical
Courts, Uni-
versities, Col-
leges, or
Schools ;

nor to Pre-
sentations to
Benefices.

[Sect. 17. " That where any right of presentation to any ecclesiastical benefice shall belong to any office in the gift or appointment of his majesty, his heirs or successors, and such office shall be held by a person professing the Roman Catholic religion, the right of presentation shall devolve upon and be exercised by the archbishop of Canterbury for the time being."

Proviso for
Presentations
to Benefices
connected
with Offices.

[Sect. 18. " That it shall not be lawful for any person professing the Roman Catholic religion, directly or indirectly, to advise his majesty, his heirs or successors, or any person or persons holding or exercising the office of guardians of the united kingdom, or of regent of the united kingdom, under whatever name, style, or title such office may be constituted, or the lord lieutenant, or lord deputy, or other chief governor or governors of Ireland, touching or

No Roman
Catholic to
advise the
Crown in the
Appointment
to Offices in
the Establish-
ed Church.

10 Geo. 4,
c. 7.

Time and
Manner of
taking Oaths
for Corporate
Offices.

concerning the appointment to or disposal of any office or preferment in the United Church of England and Ireland, or in the Church of Scotland; and if any such person shall offend in the premises, he shall, being thereof convicted by due course of law, be deemed guilty of a high misdemeanor, and disabled for ever from holding any office, civil or military, under the crown."

[Sect. 19. "That every person professing the Roman Catholic religion, who shall after the commencement of this act be placed, elected, or chosen in or to the office of mayor, provost, alderman, recorder, bailiff, town clerk, magistrate, councillor, or common councilman, or in or to any office of magistracy or place of trust or employment relating to the government of any city, corporation, borough, burgh, or district within the united kingdom of Great Britain and Ireland, shall, within one calendar month next before or upon his admission into any of the same respectively, take and subscribe the oath hereinbefore appointed and set forth, in the presence of such person or persons respectively as by the charters or usages of the said respective cities, corporations, burghs, boroughs, or districts ought to administer the oath for due execution of the said offices or places respectively; and in default of such, in the presence of two justices of the peace, councillors or magistrates of the said cities, corporations, burghs, boroughs, or districts, if such there be; or otherwise, in the presence of two justices of the peace of the respective counties, ridings, divisions, or franchises wherein the said cities, corporations, burghs, boroughs, or districts are; which said oath shall either be entered in a book, roll, or other record to be kept for that purpose, or shall be filed amongst the records of the city, corporation, burgh, borough, or district."

Time and
Manner of
taking Oaths
for other
Offices.

[Sect. 20. "That every person professing the Roman Catholic religion, who shall after the commencement of this act be appointed to any office or place of trust or profit under his majesty, his heirs or successors, shall within three calendar months next before such appointment, or otherwise shall, before he presumes to exercise or enjoy or in any manner to act in such office or place, take and subscribe the oath hereinbefore appointed and set forth, either in his majesty's High Court of Chancery, or in any of his majesty's Courts of King's Bench, Common Pleas, or Exchequer, at Westminster or Dublin; or before any judge of assize, or in any court of general or quarter sessions of the peace in Great Britain or Ireland, for the county or place where the person so taking and subscribing the oath shall reside; or in any of his majesty's courts of session, justiciary, exchequer, or jury court, or in any sheriff or steward court, or in any burgh court, or before the magistrates and councillors of any royal burgh in Scotland, between the hours of nine in the morning and four in the afternoon; and the proper officer of the court in which such oath shall be so taken and subscribed shall cause the same to be preserved amongst the records of the court; and such officer shall make, sign, and deliver a certificate of such oath having been duly taken and subscribed, as often as the same shall be demanded of him, upon payment of two shillings and sixpence for the same; and such certificate shall be sufficient evidence of the person therein named having duly taken and subscribed such oath."

[Sect. 21. "That if any person professing the Roman Catholic religion shall enter upon the exercise or enjoyment of any office or place of trust or profit under his majesty, or of any other office or franchise, not having in the manner and at the times aforesaid taken and subscribed the oath hereinbefore appointed and set forth, then and in every such case such person shall forfeit to his majesty the sum of two hundred pounds; and the appointment of such person to the office, place, or franchise so by him held shall become altogether void, and the office, place, or franchise shall be deemed and taken to be vacant to all intents and purposes whatsoever."

10 Geo. 4,
c. 7.

Penalty on
acting in
Offices with-
out taking the
Oath.

[Sect. 22. "That for and notwithstanding any thing in this act contained, the oath hereinbefore appointed and set forth shall be taken by the officers in his majesty's land and sea service, professing the Roman Catholic religion, at the same times and in the same manner as the oaths and declarations now required by law are directed to be taken, and not otherwise."

Oaths by Mi-
litary and
Naval Of-
ficers.

[Sect. 23. "That from and after the passing of this act, no oath or oaths shall be tendered to or required to be taken by his majesty's subjects professing the Roman Catholic religion, for enabling them to hold or enjoy any real or personal property, other than such as may by law be tendered to and required to be taken by his majesty's other subjects; and that the oath herein appointed and set forth, being taken and subscribed in any of the courts, or before any of the persons above mentioned, shall be of the same force and effect, to all intents and purposes, as, and shall stand in the place of, all oaths and declarations required or prescribed by any law now in force for the relief of his majesty's Roman Catholic subjects from any disabilities, incapacities, or penalties; and the proper officer of any of the courts above mentioned, in which any person professing the Roman Catholic religion shall demand to take and subscribe the oath herein appointed and set forth, is hereby authorized and required to administer the said oath to such person; and such officer shall make, sign, and deliver a certificate of such oath having been duly taken and subscribed, as often as the same shall be demanded of him, upon payment of one shilling; and such certificate shall be sufficient evidence of the person therein named having duly taken and subscribed such oath."

No other
Oath neces-
sary to be
taken by Ro-
man Catho-
lics.

[Sect. 24. "And whereas the Protestant Episcopal Church of England and Ireland, and the doctrine, discipline, and government thereof, and likewise the Protestant Presbyterian Church of Scotland, and the doctrine, discipline, and government thereof, are by the respective acts of union of England and Scotland, and of Great Britain and Ireland, established permanently and inviolably: and whereas the right and title of archbishops to their respective provinces, of bishops to their sees, and of deans to their deanries, as well in England as in Ireland, have been settled and established by law; be it therefore enacted, that if any person, after the commencement of this act, other than the person thereunto authorized by law, shall assume or use the name, style, or title of archbishop of any province, bishop of any bishopric, or dean of any deanry, in England or Ireland, he shall for every such offence forfeit and pay the sum of one hundred pounds."

Titles to Sees,
&c. not to be
assumed by
Roman Ca-
tholics.

[Sect. 25. "That if any person holding any judicial or civil office, or any mayor, provost, jurat, bailiff, or other corporate

Judicial or
other Officers

10 Geo. 4,
c. 7.

not to attend
with Insignia
of Office at
any Place of
Worship
other than
Established
Church.

Penalty on
Roman Ca-
tholic Eccle-
siastics offici-
ating, except
in their usual
Places of
Worship.

Not to repeal
Statute 5 G. 4,
c. 25.

For the Sup-
pression of
Jesuits and
other Reli-
gious Orders
of the Church
of Rome.

Jesuits, &c.
coming into
the Realm, to
be banished.

officer, shall, after the commencement of this act, resort to or be present at any place or public meeting for religious worship in England or in Ireland, other than that of the United Church of England and Ireland, or in Scotland, other than that of the Church of Scotland, as by law established, in the robe, gown, or other peculiar habit of his office, or attend with the ensign or insignia, or any part thereof, of or belonging to such his office, such person shall, being thereof convicted by due course of law, forfeit such office, and pay for every such offence the sum of one hundred pounds."

[Sect. 26. "That if any Roman Catholic ecclesiastic, or any member of any of the orders, communities, or societies hereinafter mentioned, shall, after the commencement of this act, exercise any of the rites or ceremonies of the Roman Catholic religion, or wear the habits of his order, save within the usual places of worship of the Roman Catholic religion, or in private houses, such ecclesiastic or other person shall, being thereof convicted by due course of law, forfeit for every such offence the sum of fifty pounds."

[Sect. 27. "That nothing in this act contained shall in any manner repeal, alter, or affect any provision of an act made in the fifth year of his present majesty's reign, intituled 'An Act to repeal so much of an Act passed in the Ninth Year of the Reign of King William the Third, as relates to Burials in suppressed Monasteries, Abbeys, or Convents in Ireland, and to make further Provision with respect to the Burial in Ireland of Persons dissenting from the Established Church.'"

[Sect. 28. "And whereas Jesuits and members of other religious orders, communities, or societies of the Church of Rome, bound by monastic or religious vows, are resident within the united kingdom: and it is expedient to make provision for the gradual suppression and final prohibition of the same therein; be it therefore enacted, that every Jesuit, and every member of any other religious order, community, or society of the Church of Rome, bound by monastic or religious vows, who at the time of the commencement of this act shall be within the united kingdom, shall, within six calendar months after the commencement of this act, deliver to the clerk of the peace of the county or place where such person shall reside, or to his deputy, a notice or statement, in the form and containing the particulars required to be set forth in the schedule to this act annexed; which notice or statement such clerk of the peace, or his deputy, shall preserve and register amongst the records of such county or place, without any fee, and shall forthwith transmit a copy of such notice or statement to the chief secretary of the lord lieutenant, or other chief governor or governors of Ireland, if such person shall reside in Ireland, or if in Great Britain, to one of his majesty's principal secretaries of state; and in case any person shall offend in the premises, he shall forfeit and pay to his majesty, for every calendar month during which he shall remain in the united kingdom without having delivered such notice or statement as is hereinbefore required, the sum of fifty pounds."

[Sect. 29. "That if any Jesuit, or member of any such religious order, community, or society as aforesaid, shall, after the commencement of this act, come into this realm, he shall be deemed and taken to be guilty of a misdemeanor, and being thereof lawfully

convicted, shall be sentenced and ordered to be banished from the united kingdom for the term of his natural life."

10 Geo. 4,
c. 7.

[Sect. 30. "That in case any natural-born subject of this realm, being at the time of the commencement of this act a Jesuit, or other member of any such religious order, community, or society as aforesaid, shall, at the time of the commencement of this act, be out of the realm, it shall be lawful for such person to return or to come into this realm; and upon such his return or coming into the realm he is hereby required, within the space of six calendar months after his first returning or coming into the united kingdom, to deliver such notice or statement to the clerk of the peace of the county or place where he shall reside, or his deputy, for the purpose of being so registered and transmitted, as hereinbefore directed; and in case any such person shall neglect or refuse so to do, he shall for such offence forfeit and pay to his majesty, for every calendar month during which he shall remain in the united kingdom without having delivered such notice or statement, the sum of fifty pounds."

Natural born Subjects, being Jesuits, may return into the Kingdom and be registered.

[Sect. 31. "That notwithstanding any thing hereinbefore contained, it shall be lawful for any one of his majesty's principal secretaries of state, being a Protestant, by a licence in writing, signed by him, to grant permission to any Jesuit, or member of any such religious order, community, or society as aforesaid, to come into the united kingdom, and to remain therein for such period as the said secretary of state shall think proper, not exceeding in any case the space of six calendar months; and it shall also be lawful for any of his majesty's principal secretaries of state to revoke any licence so granted before the expiration of the time mentioned therein, if he shall so think fit; and if any such person to whom such licence shall have been granted shall not depart from the united kingdom within twenty days after the expiration of the time mentioned in such licence, or if such licence shall have been revoked, then within twenty days after notice of such revocation shall have been given to him, every person so offending shall be deemed guilty of a misdemeanor, and being thereof lawfully convicted shall be sentenced and ordered to be banished from the united kingdom for the term of his natural life."

The Principal Secretaries of State may grant Licences to Jesuits, &c. to come into the Kingdom and may revoke the same.

[Sect. 32. "That there shall annually be laid before both houses of parliament an account of all such licences as shall have been granted for the purpose hereinbefore mentioned within the twelve months then next preceding."

Accounts of Licences to be laid before Parliament.

[Sect. 33. "That in case any Jesuit, or member of any such religious order, community, or society as aforesaid, shall, after the commencement of this act, within any part of the united kingdom, admit any person to become a regular ecclesiastic, or brother or member of any such religious order, community, or society, or be aiding or consenting thereto, or shall administer or cause to be administered, or be aiding or assisting in the administering or taking, any oath, vow, or engagement purporting or intended to bind the person taking the same to the rules, ordinances, or ceremonies of such religious order, community, or society, every person offending in the premises in England or Ireland shall be deemed guilty of a misdemeanor, and in Scotland shall be punished by fine and imprisonment."

Admitting Persons as Members of such Religious Orders deemed a Misdemeanor.

10 Geo. 4,
c. 7.

Any Person
so admitted a
Member of a
Religious
Order to be
banished.

The Party
offending
may be ba-
nished by his
Majesty ;

and if at
large after
Three
Months, may
be transport-
ed for Life.

Not to ex-
tend to Fe-
male So-
cieties.

Penalties how
to be re-
covered.

Act may be
altered this
Session.

Commence-
ment of Act.

[Sect. 34. "That in case any person shall, after the commence-ment of this act, within any part of this united kingdom, be admitted or become a Jesuit, or brother or member of any other such religious order, community, or society as aforesaid, such person shall be deemed and taken to be guilty of a misdemeanor, and being thereof lawfully convicted shall be sentenced and ordered to be banished from the united kingdom for the term of his natural life."

[Sect. 35. "That in case any person sentenced and ordered to be banished under the provisions of this act shall not depart from the united kingdom within thirty days after the pronouncing of such sentence and order, it shall be lawful for his majesty to cause such person to be conveyed to such place out of the united kingdom as his majesty, by the advice of his privy council, shall direct."

[Sect. 36. "That if any offender, who shall be so sentenced and ordered to be banished in manner aforesaid, shall, after the end of three calendar months from the time such sentence and order hath been pronounced, be at large within any part of the united kingdom, without some lawful cause, every such offender being so at large as aforesaid, on being thereof lawfully convicted, shall be transported to such place as shall be appointed by his majesty, for the term of his natural life."

[Sect. 37. "That nothing herein contained shall extend or be construed to extend in any manner to affect any religious order, community, or establishment consisting of females bound by religious or monastic vows."

[Sect. 38. "That all penalties imposed by this act shall and may be recovered as a debt due to his majesty, by information to be filed in the name of his majesty's attorney-general for England or for Ireland, as the case may be, in the Courts of Exchequer in England or Ireland respectively, or in the name of his majesty's advocate-general in the Court of Exchequer in Scotland."

[Sect. 39. "That this act, or any part thereof, may be repealed, altered, or varied at any time within this present session of parliament."

[Sect. 40. "That this act shall commence and take effect at the expiration of ten days from and after the passing thereof."

[Schedule to which this act refers.

Date of the Registry.	Name of the Party.	Age.	Place of Birth.	Name of the Order, Community, or Society whereof he is a Member.	Name and usual Residence of the next immediate Superior of the Order, Community, or Society.	Usual Place of Residence of the Party.

[This statute, passed in 1829, was followed in 1832 by the 2 & 3 Will. 4, c. 115 (s), intituled "An Act for the better securing the Charitable Donations and Bequests of his Ma-

(s) [Passed 15th August, 1832.]

jesty's Subjects in Great Britain professing the Roman Catholic Religion," which enacted as follows :

[“ ‘ WHEREAS by an act passed in the first year of the reign of King William and Queen Mary, intituled ‘ An Act for exempting his Majesty's Protestant Subjects dissenting from the Church of England from the Penalties of certain Laws,’ and by certain subsequent statutes, the schools and places for religious worship, education and charitable purposes of protestant dissenters are exempted from the operation of certain penal and disabling laws to which they were subject previously to the passing of the said recited act of the first year of the reign of King William and Queen Mary : And whereas by certain acts of the parliament of Scotland, and particularly by an act passed in the year one thousand seven hundred, intituled ‘ An Act for preventing the Growth of Popery,’ various penalties and disabilities were imposed upon persons professing the Roman Catholic religion in Scotland : And whereas, notwithstanding the provisions of various acts passed for the relief of his majesty's Roman Catholic subjects from disabling laws, doubts have been entertained whether it be lawful for his majesty's subjects professing the Roman Catholic religion in Scotland to acquire and hold in real estate the property necessary for religious worship, education, and charitable purposes : And whereas it is expedient to remove all doubts respecting the right of his majesty's subjects professing the Roman Catholic religion in England and Wales to acquire and hold property necessary for religious worship, education, and charitable purposes :’ be it therefore enacted, &c., That from and after the passing of this act his majesty's subjects professing the Roman Catholic religion, in respect to their schools, places for religious worship, education, and charitable purposes, in Great Britain, and the property held therewith, and the persons employed in or about the same, shall in respect thereof be subject to the same laws as the protestant dissenters are subject to in England in respect to their schools and places for religious worship, education, and charitable purposes, and not further or otherwise.”]

Provisions of
2 & 3 W. 4,
c. 115.

1 Will. & M.
c. 18.

1700, c. 3.

Roman Catholics to be subject to the same Laws as Protestant Dissenters, with respect to Schools and Places of Worship.

[Sect. 2. “ That in all cases in which schoolmasters or other persons employed in such schools or places are, as a legal qualification for such employments, now required by law to take the oath of supremacy, or the oath or declaration against transubstantiation and the invocation of saints and sacrifice of the mass, or to receive the sacrament of our Lord's Supper, or, in Scotland, to subscribe the formula annexed to the aforesaid act for preventing the growth of popery, any such schoolmaster, or other master, professing himself a Roman Catholic, shall, in lieu of the qualification aforesaid for holding such employment, take the oath contained in the statute passed in the tenth year of his late majesty, intituled ‘ An Act for the Relief of his Majesty's Roman Catholic Subjects,’ and at the times and in manner in that act mentioned.”]

Roman Catholic Schoolmasters, when required to take Oath, to take that prescribed by 10 Geo. 4, c. 7.

[Sect. 3 (t). “ That nothing in this act contained shall affect any suit actually pending or commenced, or any property now in litigation, discussion, or dispute, in any of his majesty's courts of law or equity in Great Britain.”]

Act not to affect pending Suits.

(t) [See the case of *The Attorney-General v. Todd*, 1 Keen, 811.—Ed.]

2 & 3 Will. 4,
c. 115.

Nor to repeal
Provisions in
10 Geo. 4,
c. 7, for Sup-
pression of
certain Reli-
gious Socie-
ties.

Property
held for the
Purposes
mentioned in
this Act, in
England and
Wales, to be
subject to the
Provisions of
9 Geo. 2,
c. 36.

The Statute
retrospective.

Legacies for
carrying on
good Designs
of Roman
Catholic
Schools,
valid.

For Roman
Catholic
Priests and
Chapels, bad.

[Sect. 4. "That nothing in this act contained shall be taken to repeal or in way alter any provision of an act passed in the tenth year of the reign of his late majesty King George the Fourth, intituled 'An Act for the Relief of his Majesty's Roman Catholic Subjects,' respecting the suppression or prohibition of the religious orders or societies of the Church of Rome bound by monastic or religious vows."

[Sect. 5. "That all property to be acquired or held for such purposes of religious worship, education, and charitable purposes, in England and Wales, shall be subject to the provisions of an act passed in the ninth year of the reign of King George the Second, intituled 'An Act to restrain the Disposition of Lands whereby the same may become unalienable,' and to the same laws as the protestant dissenters are subject to in England in respect of the acquiring or holding of such property: Provided always, that nothing in this act contained shall be taken to extend the provisions of the said last-recited act to that part of Great Britain called Scotland."

[This latter statute has been decided to be retrospective in two instances.

[In the case of *Bradshaw v. Tasker* (u), May 34, 1834, a testator gave two legacies to the respective trustees of certain of the (Roman) Catholic schools, upon trust for carrying on the good designs of the said schools; he died in 1823, and it was held by the Lord Chancellor (Brougham), that the foregoing act of Will. 4, for securing the charitable donations and bequests of his majesty's Roman Catholic subjects, is retrospective, and that the trustees of the school were entitled to the legacies: and on the 16th of April, 1835, in the case of *West v. Shuttleworth* (x), a testatrix directed several sums to be paid to certain Roman Catholic priests and chapels, desiring that they might be paid as soon as possible after her decease, that she might have the benefit of their prayers and masses; and she gave the residue of her property to trustees upon trust to pay 10*l.* each to the ministers of certain specified Roman Catholic chapels, for the benefit of their prayers for the repose of her soul and that of her deceased husband, and to appropriate the remainder in such a way as they might judge best calculated to promote the knowledge of the Catholic Christian religion among the poor and ignorant inhabitants of Swale Dale and Wenston Dale; and it was held by the Master of the Rolls (Sir C. Pepys (y)), that the gifts to the priests and chapels were void, and that the next of kin were entitled to the benefit of the failure, but that the gift of the residue was valid within the foregoing statute of Will. 4. See also the case of *The Attorney-General v. Todd* (1837), which fell under the 3rd section of the foregoing act, but in which both these cases were referred to by counsel.—ED.]

(u) [2 Mylne & Keen, 221.

(x) [Ibid. 684.]

(y) [Afterwards Lord Cottenham.]

Portion of Tithes.—See Tithes.**[Practice (a).****[I. GENERAL PART.**

1. <i>Subject Matter and Courts</i>	181	9. <i>Execution of Sentence—Forms</i>	211
2. <i>Who may be Parties to</i>	184	10. <i>Inhibition—Attentat—Appeal—Forms</i>	214
3. <i>Mode of conducting a Suit</i>	186	11. <i>Form of Minutes in a Cause before the Judicial Committee of Privy Council</i>	221
4. <i>Suit in the Prerogative Court</i>	192	12. <i>Letters of Request, and Form</i>	224
5. <i>Suit in the Arches Court</i>	202	13. <i>Orders of Courts at Doctors Commons, and Act of 10 Geo. 4, c. 53</i>	226
6. <i>(In both Courts) Act on Petition, and Forms</i>	ib.	14. <i>Orders of Judicial Committee of the Privy Council</i>	237
7. <i>(In both Courts) Hearing Judgment—Sentence</i>	206		
8. <i>Form of Minutes in the Registry of a Cause of Divorce</i>	209		

[1. Subject Matter and Courts.

[The subject matter over which the Ecclesiastical Courts exercise jurisdiction has been considered, generally, under the

Law of the
Ecclesiastical
Courts.

(a) [The object of the Editor has been to give, within the limited space allowed to him by the nature of this work, such a sketch of the practice of the Courts of Doctors' Commons as may not be too complicated for the general reader, and may at the same time be useful to the bar of the Ecclesiastical Courts. With this view he has had recourse chiefly to the following sources of information; viz. such points of practice as are to be found dispersed under various heads in Dr. Burn's original work, and, since its publication in the different volumes of printed Ecclesiastical Reports, the evidence given by advocates and proctors before the Committee of the House of Commons appointed to inquire into the practice and jurisdiction of the ecclesiastical courts (printed 1832); and such notices as he has been able to gather himself on the subject from a constant attendance for several years in the Courts of Doctors' Commons, and from the obliging communication of other persons. Those who wish to obtain a deeper knowledge of the subject, should consult the following works.

[I. As to the Practice of the English Courts.

1. *Praxis Francisci Clarke*, per P. Bladen, V.P.D. (London, 1684.)

2. *Titles Citation, Libel, &c. in Repertorium Canonicum*, or an Abridgment of the Ecclesiastical Laws of this Realm consistent with the Temporal, by John Godolphin, LL.D. (London, 1687.)

3. *Practice of the Ecclesiastical Courts*, by H. Conset. (Lond. 1700.)

4. *Ordo Judiciorum*, per Thomam Oughton. (London, 1728.) The first part translated, with notes by J. T. Law, M.A., Chancellor of Lichfield and Coventry. (London, 1831.) This author and Godolphin are called by Lord Stowell "the oracles of our own practice;" *Briggs v. Morgan*, 3 Phill. 329.

5. *Titles Citation, Libel, &c. &c. in Ayliffe's Parergon Juris Canonici*. (London, 1726.)

6. Similar titles in Gibson's *Codex Juris Ecclesiastici*. (Oxford, Clarendon Press, 1761.)

7. *Cockburn's Clerks' Assistant*. (London, 1800.)

titles *Archies*, *Courts* and *Prohibition* (*a*); the object of the Editor in this chapter is to give an outline of the mode of proceeding in the two principal Courts established at Doctors' Commons, which are held with the same regularity as the courts of common law, for the administration of justice over those civil interests of the subject which the constitution of this country has entrusted to their cognizance. The system of law which governs the decision of these courts, and which is blended from the civil law of ancient, and the canon law of modern Rome, the ecclesiastical constitutions, and the statute and common law of this realm, has been treated of in the preface to this work; but it seems proper to observe, in this place, that no Ecclesiastical Court is a Court of Record (*b*), and that every Consistorial or Diocesan Court in the country, as well as various Peculiars, exercise the same jurisdiction in kind, though limited in degree, as the Court of Arches and the Prerogative Court, which are held at Doctors' Commons.

Jurisdiction
of the Arches
Court;

[The Court of Arches is the Court of Appeal from all the inferior Courts of the province of Canterbury (*c*). The Judge of this Court is not necessarily, but by long usage, Judge of the Prerogative Court, and also of certain Peculiars (*d*) exempt from the jurisdiction of their ordinary, and subject only to the metropolitan. As judge of the Arches Court, his *appellate* jurisdiction in civil suits extends over all causes relative to marriages, wills, tithes (*e*), church-rates, dilapidations, seats and monuments, &c., in churches and church-yards:—in criminal suits, over all causes relative to the correction and discipline of clerks (*f*), to suits of defamation and incest and brawling in a church or church-yard against laymen, for neglect of duty against churchwardens, &c. It has been generally held that there is this peculiarity about the criminal jurisdiction of

[II. *As to the Practice of the Irish Courts.*

1. Cunningham's Forms and Precedents for Ecclesiastical Courts. (Dublin, 1834.)

2. Bullingbroke's Eccles. Laws, chapters 43 to 46. (Dublin, 1770.)

[III. *As to Foreign Writers on the Practice of the Civil and Canon Law.*

1. Andr. Gaill. *Practicæ Quæstiones*. (Cologne, 1634.)

2. *Speculum Gul. Durandi, cum Annot. Johannis Andreæ*. (Basle, 1574.)

3. "Speculum Aureum," called also "Advocatorum Lumen," of Maranta. (Frankfurt on the Maine, 1586.)

4. *Censura Forensis Theoretica Practica*, by Simon Von Leewen.

(Amsterdam.) An excellent work.

5. The very full Catalogue of writers on the Civil Law, Practical and Theoretical, given at the end of the first part of Macheldey's *Lehrbuch des Römischen Rechts* (Giessen, 1838) should be also consulted.—Ed.]

(*a*) [See also titles *Advocate*, vol. i. and *Proctor*, in this volume.

(*b*) [3 Black. C. 67, 69; 1 Stark. Ev. 243.]

(*c*) [With the exception of a Royal Peculiar, from whom the appeal lies to the Q. in Council.—Ed.]

(*d*) [See title *Peculiars*.]

(*e*) [See title *Tithes*.]

(*f*) [See title *Privileges and Restraints of the Clergy* for the present mode of proceeding against clerks in holy orders.]

the judge of the Arches Court, that alone, of all Ecclesiastical Judges, he can deprive a clergyman of his living (*g*). This Court has also *original* cognizance in suits for a legacy where the will has been proved in the Prerogative Court (*h*), and it may entertain *original* suits on Letters of Request (*i*) from the inferior courts. The judge of the Prerogative Court (who, we have seen, is usually the same person as the judge of the Arches) exercises *original* jurisdiction over all causes of wills and intestacies where there is more than 5*l.* (*bona notabilia*) belonging to the deceased beyond the limits of the local ordinary.

of the Prerogative;

[The Chancellor of the Diocese of London (*k*) also holds his Court at Doctors' Commons, and his decisions are printed in the Ecclesiastical Reports. And in the few instances in which a cause has been argued before the Master of the Faculties, his Court has been held at Doctors' Commons. See titles *Faculties* and *Notary Public*.

of the Consistory of London.

[There is a remarkable peculiarity which distinguishes certain suits in the Ecclesiastical Court from those which can be brought in equity, or at common law. It is this: the original object of a suit may be changed, and assume in the conclusion an entirely different shape from that in which it had been instituted. A suit may be commenced against a woman for jactitation of marriage, and if her defence be that she was duly married, and this defence be established, the sentence will be a decree against the husband for a restitution of conjugal rights. A wife may sue for a restitution of conjugal rights, and the defence of the husband may be that she has been guilty of adultery, and if he succeed, the sentence will be a divorce *à mensâ et thoro* against the wife. On the same principle, a husband against whom a wife has instituted a suit for divorce on the ground of cruelty, may plead her adultery in a responsive allegation (*l*), and is not compelled to take out any separate or cross citation for the purpose. And a wife who has instituted her suit for cruelty has been allowed to give in on affidavit additional articles, pleading acts of adultery by the husband subsequent to the commencement of the suit (*m*), and even prior to its institution, when they have been sworn to be *noviter perventa* to her knowledge (*n*).

Original Object of Suit may be changed.

(*g*) [See title *Deprivation*, vol. ii. But there seems no reason to deny this power to the judge of the province of York; and according to the report in Dyer of the case of *Goodman v. The Dean of Bath and Wells*, the commissary of the Bishop of Bath and Wells exercised this authority, see tit. *Deans and Chapters*.]

(*h*) [See modes of proceeding in a suit for a legacy, under title *Arches*, vol. i. p. 98 b.]

(*i*) [*Vide* "Letters of Request," post, p. 224.]

(*k*) [The celebrated judgments of Lord Stowell delivered in this Court are usually known by the title "Consistory Reports."]

(*l*) [*Best v. Best*, 1 Ad. 411.]

(*m*) [*Barrett v. Barrett*, 1 Hagg. 22.]

(*n*) [*Sampson v. Sampson*, 4 Hagg. 285.]

[2. Who may be Parties to a Suit.

[The general law upon this branch of the subject is thus simply and clearly enunciated by Lord Stowell (a), "The Criminal Suit is open to every one, and the Civil Suit to every one showing an interest." The Criminal Suit is instituted by what is technically termed "Promoting the Office of the Judge," *vide post*, under SPECIAL PART, *Articles*, p. 283.

Persons
excommu-
nicated (b).

[1. Formerly no excommunicated person had any "*persona standi*" in an ecclesiastical court; and in a recent case in the Court of Arches, where a dissenter promoted the office of the judge against a clergyman, an objection was taken by the counsel for the latter against the institution of the suit by one who it appeared from the evidence was among those denounced by the 9th and 12th canons as schismatics, and therefore *ipso facto* excommunicate, it being contended that the 53 Geo. 3, c. 127, had only removed civil penalties from dissenters. The judge, however, overruled the objection, holding that except for the purpose mentioned in the act, there was no longer any excommunication.

[But since the 53 Geo. 3, a party pronounced *contumacious* and whose *contempt* has been *signified* at a preceding stage of the cause for disobedience to any order of the judge, cannot appear in court at a subsequent period, or prosecute an appeal from proceedings carried on *in pœnam*, until he has been absolved from his contempt, and taken the oath *de parendo juri* (c) to his ordinary (d).

Outlaw.

[An outlaw, it is presumed, would have no *persona standi* in these courts.

Minors, imbe-
cile Persons,
Lunatics.

[2. All minors may bring suits by their guardian, elected for the purpose by the Ecclesiastical Courts; lunatics by their committee appointed by the Court of Chancery. But the judge cannot compel a father to continue as a party in a suit when his son has become a major during its continuance; if he attempt to do so, he will be liable to an action on the

(a) [Turner v. Meyers, 1 Consist. 415, note.]

(b) [Mastin v. Escott, reported by Dr. Curteis, June 9, 1841; but the decision in this case is appealed from.—Ed.]

(c) [Lynd. De Sent. Excom. c. Decernimus, and p. 266, v. Comodum; and X. 2, 25, 11; X. 5, 39, 40; Decret. l. 2, tit. 25, c. 12; Doujat in Lancel. lib. 4, 319, 343. "Licet a censuris ecclesiæ absolvatur, debet tamen etiam ipse præstare juramentum de parendo mandatis ecclesiæ, sicut ille qui absolutè absolvitur," Decret. l. 5, t. 39, c. 52, Venerabili. "Ubi manifestum est delictum, non

conceditur absolutio, nisi præviâ cautione de parendo mandatis ecclesiæ," Doujat in Lancel., l. 4, 347. See Fitzherbert, Nat. B. 62; 2 Inst. 189; 8 Rep. 68; and the recent case of Baines, High Court of Chancery and Queen's Bench, 1841: but if the contempt has not been *signified*, it would seem that it is purged by appearance and payment of costs; see Herbert v. Herbert, 2 Phillimore, 438, 439, Arnold & Swabey, *arguendo*.—Ed.]

(d) [Nor could he have been released from an imprisonment until the passing of 3 & 4 Vict. c. 93. See title *Excommunication*, and *Execution of Sentence*, *post*, p. 211.—Ed.]

case at common law (*e*). The committee of a lunatic husband have instituted a suit for divorce (*f*), on account of the adultery of the wife; nor is it necessary that there should be a previous resort to the Lord Chancellor for permission to exercise this authority. In suits for nullity, the same power of the committee has been admitted and a marriage has been dissolved on account of the alleged mental incapacity of the party; but if a son recovers his capacity, he, and not his father, must institute a suit for the dissolution of a marriage contracted during his insanity (*g*).

[3. Married women may, in certain cases, institute *alone* a civil suit in the ecclesiastical courts, as in a case of defamation (*h*), or in a legacy bequeathed to her separate use. Married Women.

[4. A person may sue *in formâ pauperis*; but “this is a great privilege of law belonging only to the necessity arising from absolute poverty and from the absence of any other mode of obtaining justice; no person is entitled to the gratuitous labours of others who can furnish the means for providing them for himself: besides, it places the adverse party under great disadvantages, it takes away one of the principal checks to vexatious litigation; the legal claim therefore to so great a privilege ought to be clearly made out. It is a complete but not an uncommon misapprehension of the law to suppose that because a person is in insolvent circumstances, and because he can truly swear that he is not worth 5*l.* after all his just debts are paid, that therefore he is entitled to be admitted, or, rather, to proceed, as a pauper; it is *primâ facie* ground to admit him as such, but no more (*i*).” It would seem from the cases cited in this extract from Sir J. Nicholl’s judgment, that the *criterion* is, the *income*, and not the *debts*, of the party; for instance, where a person admits an income of 70*l.* per annum, and owes 200*l.* beyond his effects, he will not be admitted to sue as a pauper. A person erroneously admitted as a pauper may be dispaupered. It should be remarked that in suits for separation and alimony the court is very reluctant to admit the party proceeded against as a pauper, it being, in the language of Lord Stowell, “at once shutting the door against redress and defeating one great object of the suit (*k*).” Paupers.

[5. *Interveners* in a suit are unknown to the common law, but the doctrine of the civil and canon law administered in the Interveners.

(*e*) [*Beaurain v. Scott*, 3 Campb. 388.]

(*f*) [See *Parnell, by his Committee, v. Parnell*, a case *primæ impressionis* decided by Lord Stowell on this subject, 2 Phill. 158; and *Earl of Portsmouth by his Committee v. Countess of Portsmouth*, 1 Hagg. 355.—Ed.]

(*g*) [See *Turner v. Meyers*, 1 Consist. 415.]

(*h*) [*Anon.* 3 Salk. 288; *Chamberlaine v. Hewson*, 5 Mod. 70; *Dominus Gerard v. Dominam Gerard*, error, C.B., 1 Raym. 73; *Tarrant v. Mawr*, 1 Stra. 756; *Capel v. Robarts*, 3 Hagg. 161, in note.—Ed.]

(*i*) [The whole law on this subject is elaborately discussed in *Lovekin, &c. v. Edwards, &c.* 1 Phill. 179.—Ed.]

(*k*) [1 Phill. 184, in notis.]

Admiralty and Ecclesiastical Courts (*l*), is, "*Tertius intervenire potest pro interesse suo in omni causâ quæ tangit bona aut personam suam* (*m*).” In a matrimonial cause there may be an intervention (*n*) at any time, even in the appeal; but a person who has no interest cannot be permitted to intervene (*o*). In testamentary causes, it has been said, that “Interveners must take the cause in which they intervene as they find it at the time of such their intervention; hence they can only of right do what they might have done had they been parties in the first instance, or had their intervention occurred in an earlier stage of the cause (*p*).” In cases of incestuous marriages the court allows a very slight degree of interest to annul them (*q*). In a case of divorce, where the alleged marriage is denied to be valid, the court has permitted third parties who have estates expectant (*inter alia*) upon the issue of such marriage being declared illegitimate, to be *cited to see proceedings* so far as relate to the marriage (*r*); but such parties cannot object to the manner in which the original citation in the cause was executed, nor can an intervener take an objection to the jurisdiction of the court if the principal parties litigant have submitted to it (*s*). The passage on which this law of intervention in appeals is founded appears in the Digest:—“*A sententiâ inter alios dictâ appellari non potest nisi ex justâ causâ, veluti si quis in cohæredum præjudicium se condemnari patitur, vel similem huic causam, quamvis vel sine appellatione tutus est cohæres; item fidejussores pro eo pro quo intervenerunt, igitur et venditoris fidejussor emptore victo appellabit, licet emptor et venditor acquiescant* (*t*).”

GENERAL OUTLINE OF A SUIT IN THE ECCLESIASTICAL COURTS.

[3. *Mode of conducting a Suit.*

[It seems to be the most convenient arrangement of this chapter, to give in this place a general sketch of the forms to be observed in the conduct of a suit, both civil and criminal, in the Ecclesiastical Court.

(*l*) [Clarke's Praxis Admiralty, t. 38, 39.]

(*m*) [Oughton, Ordo Judic. p. 28, tit. xiv.; and see *Pétreis v. Tondear*, 1 Consist. 136.]

(*n*) [*Dalrymple v. Dalrymple*, 2 Consist. 137.]

(*o*) [*Brotherton v. Hellier*, 1 Lee, 599.]

(*p*) [*Clement v. Rhodes and other*, 3 Add. 40, per Sir J. Nicholl.]

(*q*) [1 Consist. 188; *Ray v. Sherwood*, 1 Curt. 173—193.]

(*r*) [*Montague v. Montague*, 2 Ad. 372.]

(*s*) [*Donegal v. Chichester*, 3 Phill. 596; *Donegal v. Donegal*, 3 Phill. 593, 613.]

(*t*) [See Dig. l. 5, pr. De Appellat. xlix. 1, Marcian; and Voet. l. 5, tit. De Judiciis, ss. 35, 36; and the passages in the Pandects referred to by Mühlenbruch, in his “Delectus Legum,” p. 2472; Pars Gen. l. 2, c. v. s. 169.]

["Causes," says Conset(u), "in respect of their different way of proceeding are two-fold, plenary and summary.

Causes
Plenary and
Summary.

["1. Plenary causes, or ordinary causes, are those which require a solemn order in the proceedings, as the contestation of suit; a term assigned to propound and invoke all acts, &c., a term to conclude, and a due form of concluding in that term, &c., and thence it is they are called plenary.

["2. What causes these are that require this manner of process must be learnt from those learned in the civil law; however, these following causes by ancient and daily practice are found to be plenary causes, viz.—

["Every testamentary business, and contests about temerary administrations, except in the Prerogative Court.

Plenary
Causes.

["All causes of legacy; defamation or reproach; divorce or separation from bed and board; dilapidation; jactitation or boasting of matrimony; subtraction of procurations; subtraction of an annual pension; perjury at the instance of a party; notorious simony at the instance of a party; correction of the mere office, or voluntarily promoted; notorious usury at the instance of a party; injection, or laying violent hands upon a clergyman at the instance of a party; impediment of marriage; and right about seats in the church.

["And it is to be particularly observed, that if in any of these plenary causes any proceed summarily, that is, without contestation of suit, &c., all the proceedings are immediately null.

["3. Summary causes are such as respect not this solemn and ordinary way of proceeding in judgment; but they require a summary and short proceeding, and, as they term it, *absque strepitu judicii, et de simplici et plano*. And these causes are all those whereof the Prerogative Court takes cognizance; for by the style of that court, they are all called summary causes. And if any proceed plenarily in these causes, the proceeding is not nulled, but more valid; if therefore the proctors doubt which causes are plenary, and which are summary, they may proceed plenarily although the cause be summary, and by that means avoid all danger of nulling the proceedings."

Summary
Causes.

["The mode of commencing the suit, and bringing the parties before the court, is by a process called in the Consistorial Courts a Citation, containing the name of the judge, the plaintiff, and name, residence, and diocese of the defendant; the cause of action, and the time and place of appearance. In the Prerogative Court this process is called a Decree. This Citation, in ordinary cases, is prepared and signed by the proctor, and issued under seal of the Court; but in special cases, the facts are alleged in what is termed an Act of Court, and upon those facts the Judge or his Surrogate decrees the

Citation.

(u) [Conset's Practice of Ecclesiastical Courts, part 1, s. 2.]

party to be cited, to which, in certain cases in the Prerogative Court, is added an Intimation, that if the party does not appear, or, appearing, does not show cause to the contrary, the Court will proceed to do as therein set forth. These Decrees or Citations are signed by the Registrar of the Court.

First plea—
its different
Names.

[The name of the first Plea varies according to the description of the cause. In Criminal Proceedings, the first Plea is called Articles, because it runs in the name of the judge, who *articles* and *objects*. In Plenary Causes, which are not criminal, the first Plea is termed the Libel, and runs in the name of the party or his proctor, who *alleges* and *propounds* the facts founding the demand. In Testamentary Causes, the first Plea is called an Allegation.

Subsequent
Pleas.

[This first plea, though more comprehensive (especially in Criminal Suits), is analogous to a Declaration at Common Law, or a Bill in Equity. But there is this characteristic difference, that all such Pleas are broken into separate positions or *articles*, the facts upon which the party founds his demand being alleged under separate heads according to the subject matter and the time in which they have occurred. Every *subsequent Plea*, in all causes, whether Responsive or Rejoining, and by whatever party given in, is termed an Allegation.

Advantages
incident to
this Mode of
Pleading.

[Here it should be remarked, that before a plea of any kind, whether Articles, Libel, or Allegation, is admitted, it is open to the adverse party to object to its admission, either in the whole or in part; in the whole, when the facts altogether, if taken to be true, will not entitle the party giving the plea to the demand which he makes, or to support the defence which he sets up; in part, if any of the facts pleaded are irrelevant to the matter in issue, or could not be proved by admissible evidence, or are incapable of proof.

[These objections are made and argued before the judge, and decided upon by him; and his decision may be appealed from. For the purpose of the argument, all the facts capable of proof are assumed to be true: they are, however, so assumed, merely for the argument, but are not so admitted in the cause; for the party who offers the plea, is no less bound afterwards to prove the facts; and the party who objects to the plea, is no less at liberty afterwards to contradict the facts. This proceeding is attended with great convenience in abridging the introduction of unnecessary and improper matter, to which parties themselves are generally too much disposed. They are apt to consider trivial circumstances to be important, and desire them to be inserted in the plea; a desire which neither the honest reluctance of the practitioners, nor the judicious advice of counsel, is always able to counteract: even the authority and vigilance of the court itself cannot altogether prevent redundant pleading, and can only check it by taking it into consideration on the question of costs.

[The proceedings just referred to have also the convenience of enabling parties, in many instances, to take the opinion of the court in a very summary way, particularly in amicable suits: if the facts are candidly stated, and the court, upon the plea being objected to, should be of opinion, that if proved, the facts either will or will not support the prayer of the plea; in the one case, if the plea is admitted, the further opposition may be withdrawn; in the other case, if the plea is rejected, the party offering it either abandons the suit, or appeals, in order to take the judgment of a superior tribunal. This course saves the expense and delay consequent upon proving the facts by witnesses, in cases where there exists no doubt of the facts being correctly alleged in pleas, and where the question between the parties is principally or perhaps altogether a question of law arising out of the facts so stated in plea.]

[The plaintiff, or his proctor who brings in the Libel, prays that a day may be assigned for the defendant's or his proctor's answer to it, and on such day assigned, the plaintiff or his proctor, in presence of the defendant or his proctor, requests the answer, the giving of which creates the *litis contestatio* (v), which common lawyers call the *issue* (x). Such issue may be either, 1, *simple affirmative*, in which case there is of course an end of the suit; or, 2, *simple negative*, consisting of a general denial of the Libel; or what may be termed, 3, *qualified affirmative or negative*, in the language of Conset (y). "When the defendant doth indeed confess the fact, but yet adds some certain qualities or circumstances of this fact, which are silently passed over by the plaintiff, by reason of which omission of the circumstances of the fact it may be said to be different from the fact propounded in the libel; hence, though the defendant may not simply deny the fact, yet he may do it indirectly, while he shows the fact to be much otherwise than what is related by the plaintiff (z)." In causes of Divorce the party generally answers by confessing the fact of marriage, but otherwise contesting the suit negatively.]

Litis con-
testatio ;

different
kinds of.

[The plaintiff is, in all civil causes, entitled to what are called the Personal Answers of the defendant on oath, with this exception, that the defendant is not bound to answer any criminal matter, though *civiliter intentata*, as the charge of adultery in a matrimonial suit. In criminal suits he cannot be called upon for answers at all. This stage of the cause

Personal
Answers.

(v) [The origin of the phrase is to be traced to the primitive manners of the Romans. At the opening of the suit the defendant invoked some of the standers by as witnesses. This was called *antestari* or *contestari*. See *Festus de V.S. sub voce "Contestari."*]

(x) [Before issue given, a suit is not held to be commenced by the

civil or canon law, 1 Consist. 213; but from the return of the citation there is a *lis pendens*. See *Sherwood v. Ray*, 1 Curteis, 173, 193; Moore's P. C. R. vol. i. p. 365.—ED.]

(y) [Page 87, part 3.]

(z) [See an instance, p. 3, of *Mastin v. Escott*, reported by Dr. Curteis, 1841.]

corresponds with the Plea at Common Law (*a*), i. e., it is an answer of fact to all and every the positions or Articles of the Libel (which, we have seen, resembles the Declaration.)

Designation
of Witnesses.

[Whatever parts of the libel (or allegation as the case may be) the defendant has not admitted (*b*) in his personal answers, the plaintiff proceeds to prove by witnesses. And a notice, called a Designation, is delivered to the defendants of their names, and the different articles on which it is intended to examine them; he is therefore distinctly apprised of the points to which he should address his cross-examination of each witness, as well as the matters which it may be necessary for him to contradict or to explain by counterpleading; the mode of doing this, is to give in a Responsive Allegation (*c*), which may be attended with the same consequences as the earlier plea, that is to say, objections to its admissibility, answers upon oath, and the examination of witnesses. The witnesses are examined secretly, and their depositions taken down by an examiner. Publication of the evidence is prayed by one party, and unless the party has not had time to prepare his Interrogatories, or unless he alleges an Allegation Exceptive to the evidence (*d*), publication is decreed by the judge.

Responsive
Allegation.

Examination
of Witnesses.

Term as-
signed for
Proof.

[In all cases the court may extend this time on reasonable cause being shown (see Rule 11 of Orders of Court); and its duration must, too, of course, depend on the distance of the abode of the witnesses, the facility of reaching them, &c. Each term assigned is technically called an *Assignment*, and the book in which the minutes of the Court were kept by the Registrar is called the *Assignment Book*. The term given for proof is called the *Term Probatory*. The court may also, on very strong reasons being shown, renew a lapsed term.

Counter
Allegation.

[A Counter Allegation may be given in to the Responsive Allegation, and is subject to the same incidents and rules as the former. But in a rejoinder to a Responsive Allegation, the only facts strictly pleadable are those either contradictory to or explanatory of facts pleaded in the Allegation to which it rejoins, and those *noviter perventa* to the proponent's knowledge; though the court *may*, under certain circumstances, permit facts to be pleaded which do not come under these descriptions (*e*). Beyond this step the mere pleadings are rarely carried (*f*), but it should seem that the discretion

(*a*) [See Stephen on Pleading, p. 25.]

(*b*) [See *post*, Rule 10 of Orders of Court of 1830.]

(*c*) [This plea is sometimes confounded by inferior Ecclesiastical Courts with the personal answers.]

(*d*) [See *Evidence, post*.]

(*e*) [*Dew v. Clark*, 2 Add. R. 102.]

(*f*) [A fourth allegation was admitted by the judge of the Consistorial

Court of London, in *Sarjeant v. Sarjeant*, on the ground that it afforded the judge better means of arriving at a just conclusion, June 27th, 1834. For the *exceptio* of the Roman law, see Inst. 4, 13; 1 Dig. 44, 1; for the *replicatio*, 1 Dig. 44, 1, fr. 22; Inst. 4, 14; and 4 Dig. 12, 2, fr. 9; for the *duplicatio*, 1 Inst. 4, 14, fr. 2, 3; 1 Dig. 44, 1.—Ed.]

of the judge and the advocate, and the apprehension of costs, rather than any positive rule, prevents further pleading; and here one exception should be mentioned, it is always permitted to give in an allegation of facts "*noviter perventa*" to the knowledge of one of the parties in the suit, it being fully established to the satisfaction of the judge that such facts could not have been earlier known to the party now propounding them. For instance, as has been said, in Matrimonial Causes it is allowed to plead acts of adultery committed since the institution of the suit; or before, such being shown to be *noviter perventa*. An exceptive allegation also may be given under certain restrictions to the character of witnesses, the nature of which is discussed under SPECIAL PART, *Evidence*.

[But when the parties in a cause renounce all further allegations, unless exceptive, *the cause is concluded* against them, though it is still within the discretion of the court to allow further pleading (g). (*Vide* "*Hearing, Judgment, Sentence*," *post*, p. 206.)

[The instruments adopted by the Ecclesiastical Court for giving effect to its process are, first, *Citation* or *Decree*, as has been shown, *vide supra*; and secondly, *Monition* (h), that is to say, granting to the party complaining an order *monishing* the party complained against to obey "under pain of the law and contempt thereof." Thus there may be a Monition for Personal Answers, for bringing in Scripts and Scrolls, for Payment of Costs or Alimony, to Churchwardens to hold a Vestry, to a Clergyman to reside, &c. &c.

[The difference between a Citation and a Monition seems to be, that the former requires a party to appear, the latter an act to be done.

[Thirdly, *Compulsory*: a writ to compel the attendance of a witness to undergo examination.

[All writs require a *certificate* of their execution. Such certificate is indorsed on the instrument setting forth the day and place of service on the party, signed by the officer or person who served it. An affidavit is also indorsed to the truth of the certificate.

[The last resource of the ecclesiastical courts for the enforcement of their processes, is to obtain a writ "*de contumace capiendo*." (*Vide* "*Execution of Sentence*" (i)).

(g) [*Middleton v. Middleton*, 2 Hagg. Rep. Suppl. 135. See, *post*, under SPECIAL PART, p. 266, as to rescinding the conclusion of the cause.] "Citation," "Costs," "Evidence," forms of these instruments.]

(i) [*Post*, p. 211. See also tit. *Ex-communication*, vol. i. p. 260.]

(h) [See, *post*, under SPECIAL PART,

[4. Suit in the Prerogative Court.]

By Caveat	192	By Special Allegation	198
By Decree—Form of	ib.	Process by Decree	199
Progress of the Suit after Decree	193	Process where a Decree cannot be personally served before proceeding “in p̄nam contumaciae”	200
By Common Condidit (Forms of, before and since Jan. 1, 1838)	194	Appearance under Protest	201

How long valid.

Its effect.

Distinction between Decree and Citation.

[*By Caveat.*—It has been seen that all suits in this court are termed summary. An ordinary mode of commencing a suit in the Prerogative Court is, by entering in the registry what is technically termed *a caveat*, that is to say, a warning to the registrar that nothing be done in the goods of the deceased without notice being given to the proctor who entered such caveat; it is usually entered in a fictitious name. Strictly speaking, it is considered to remain valid for six months, but by the common usage of the Prerogative Office it is allowed to extend to a longer period; and such notice is usually given after that period has expired, if the caveat falls under observation. The effect of such a procedure is, that the proctor who applies to the court to grant probate of a will or administration of the personalty of such deceased, must *warn the caveat*; and then the proctor who entered the caveat must appear, set forth the interest, and declare the real name of the party in whose behalf it was entered. The suit then proceeds in the same manner as if it had originally begun

[*By Decree.*—It has been said that all testamentary causes commence by decree. Only a suit for inventory and account begins by a citation.—There is a distinction between these two initiatory processes. A citation is signed by a proctor, and issues under seal upon the proctor's signature alone, and generally in one form; whereas a decree is signed by the registrar of the court, being a decree of the judge upon a special statement, which varies according to the facts and circumstances of the case, and is not, like a citation, a common form of process. *Vide infra*, under SPECIAL PART, *Citation*.

[*Form of Decree in a Testamentary Cause, citing the Parties entitled in distribution to a Deceased's Effects, in case he had died intestate, to appear and see the Proceedings in such Cause.*

[*William, by Divine Providence Archbishop of Canterbury, Primate of all England and Metropolitan: To all and singular clerks and literate persons whomsoever and wheresoever in and through our whole province of Canterbury, greeting. Whereas the Right Honourable Sir —, Knight, Doctor of Laws, Master, Keeper, or Commissary of our Prerogative Court of Canterbury, lawfully constituted, rightly and duly proceeding in a certain cause or business of proving by witnesses in solemn form of law the true and original last will and testament of A. B. late of —, in the county of —, deceased, which was promoted by*

C. D. the executor named in the said will, against E. F. the natural and lawful brother and one of the next of kin of the said deceased, at the petition of the proctor of the said C. D., alleging that G. H. is the natural and lawful sister and one of the next of kin of the said deceased, and besides the said E. F. the only person entitled in distribution to his personal estate and effects in case he had died intestate, hath decreed the said G. H. to be cited, intimated and called to appear in judgment on the day, at the time and place, to the effect and in manner and form following, justice so requiring. We do therefore hereby authorize and empower and strictly enjoin and command you, jointly and severally, peremptorily to cite or cause to be cited the said G. H., by showing her this original decree under seal, and by leaving with her a true copy hereof, that she appear personally, or by her proctor duly constituted, before our master, keeper, or commissary aforesaid, his surrogate, or some other competent judge, in this behalf, in the Common Hall of Doctors' Commons, situate in the parish of Saint Benedict, near Paul's Wharf, London, and place of judicature there, on the cateat day after Trinity Term, to wit —, the — next ensuing, and also on every other court day, then and there to see and hear all and every the judicial acts, matters and things needful and by law required to be done and expedited in and about the premises, until a definitive sentence in writing shall be read, signed, promulged and given, or until a final interlocutory decree shall be made and interposed in the said cause or business, if she shall think it for her interest so to do, and further to do and receive as unto law and justice shall appertain, under pain of the law and contempt thereof, at the promotion of the said C. D.; and moreover that you intimate or cause to be intimated to the said G. H. unto whom by virtue of these presents we so intimate, that if she do not appear on the day, at the time and place, to the effect and in manner and form aforesaid mentioned, or on appearing do not show good and sufficient cause concludent in law to the contrary, our master, keeper, or commissary aforesaid, his surrogate, or some other competent judge in this behalf, doth intend to proceed and will proceed to do and expedite all and singular such judicial acts, matters and things as may be needful and by law required to be done and expedited in and about the premises, to the giving and pronouncing a definitive sentence in writing, or making and interposing a final interlocutory decree in the said cause or business, the absence or rather contumacy of her the said G. H. so cited and intimated in anywise notwithstanding, and what you shall do or cause to be done in the premises you shall duly certify our master, keeper, or commissary aforesaid, his surrogate, or some other competent judge in this behalf, together with these presents. Given at London the — day of —, and in the — year of our translation,

<i>C. D.</i>	}	<i>Deputy Registers.</i>
<i>J. J.</i>		
<i>W. F. G.</i>		

[*Progress of the Suit after Decree.*]—The next step is to serve personally on the party, either by the officer of the court or his deputy, the decree. When the decree is returned, the proctors exhibit proxies under the hands and seals of their respective parties, appointing them proctors in the suit. The next and most important stage in the cause is the calling for an

affidavit of scripts; that is, as to all testamentary papers of the deceased, executed or unexecuted, which have at any time come to the possession or knowledge of the parties. Such affidavit is exhibited by each of them with the scripts in their possession annexed.

[*Form of Affidavit of Scripts.*]

[*Appeared personally Elizabeth Goodlake, of Swindon, in the county of Gloucester, widow, one of the parties in this cause, and made oath, that no script, scroll, paper, parchment, or other writing, being, or purporting to be, or having the face, force, form, or effect, of a will or codicil, or other testamentary disposition, of James Wood, late of the city of Gloucester, esquire, deceased, at any time either before or since his death, have come to the hands, possession or knowledge of this deponent, save and except two certain paper writings, now respectively marked (A) and (B), and purporting to be and contain the last will and testament of the said deceased, bearing date, as alleged, the second and third days of December, in the year of our Lord one thousand eight hundred and thirty-four, in which Matthew Wood, John Chadborn, Jacob Osborne, and John Surman Surman are the executors therein named.*

Elizabeth Goodlake.

*The second day of June, in the year of
our Lord 1836, the said Elizabeth
Goodlake, widow, was duly sworn to
the truth of the foregoing affidavit.*

Before me,

Thomas William Goodlake,

Commissioner and Officiating Minister of the parish of Swindon.

In the presence of

John Cox, of No. 94, High-street, Cheltenham, Esquire,

John Surman Cox, of No. 2, Bath-street, Cheltenham, Solicitor.

*Affidavit as
to Plight.*

[And if any document or other script be annexed, having alterations or obliterations, an oath should be taken as to their *plight* and *condition*.]

[It not unfrequently happens that the production of these documents puts an end to the suit. But if not, the suit may proceed as follows:—The proctor for the executor calls on the proctor for the next of kin to declare whether he will oppose the will, and on his declaring that he does oppose it, the other declares that he propounds it (*l*), and asserts or brings in an allegation, which, if it merely pleads the *factum* of the will, and the capacity of the testator, is admitted as a matter of course, and termed a

*Process of
this Suit
when the ad-
verse Party
does not
assert an
Allegation.*

[*Common Condidit (m).*]—This Allegation contains the *factum* of the instrument propounded, the instructions for it, the execution of it, and the capacity of the testator at the time the

(*l*) [This amounts to contestation of suit in the Prerogative Court.]

(*m*) [No will under the new act 1 Vict. c. 26, can be, strictly speaking, propounded in the form of a "Com-

mon Condidit," inasmuch as this statute requires the pleading of additional circumstances; see form *post*. —ED.]

instructions were given and the instrument executed. When this mode of proceeding by Common Condidit is adopted by the party propounding the will, the condidit is admitted as a matter of course. The answers of the adverse party may then be called for; they should be specific to each article of the Plea, and contain an admission or denial of the facts pleaded, or an explanation of the circumstances. A copy of the Plea is delivered to the adverse party, to whom each article of the Plea and his Answers to it are read over previous to their being given into Court. It often happens that these Answers are not called for, but they may be voluntarily produced. The next stage is the production and examination of Witnesses; after their evidence has been taken, Publication is prayed by the propounding party, and unless the adverse party asserts an Allegation, Publication passes; and then, unless an Exceptive Allegation to the Evidence be asserted, the cause is set down for hearing. But if when Publication is prayed the adverse party asserts an Allegation, time is allowed to consider whether or not it be opposable (n). If it be admitted, the same process of examining witnesses and praying Publication takes place, and then it is competent to the party giving in the Condidit to assert a plea responsive to his adversary's Allegation; and upon this responsive plea also answers may be called for, and witnesses examined. It should be remarked, that, as the object of the answer is to save the expense of proving facts which the party may admit in his answer, it is important it should be given in as soon as possible after the admission of the plea. The judge may, if the exigency of the case requires it, admit a fourth Allegation, but this is of rare occurrence (o). Lastly, after all the evidence has been taken upon the Condidit and the Allegations, as has been shown, Publication passes, and (unless such Publication give rise to an Allegation Exceptive to the credit of the witnesses), the cause is set down for hearing.

When he
does assert an
Allegation.

When Publi-
cation passes.

[*Form of Common Condidit (of a Date prior to 1st January, 1838), pleading the Execution of a Will by a Deceased Person.*

[*In the Prerogative Court of Canterbury.*

On the caveat day after Trinity Term, (to wit) the — day of —, one thousand eight hundred and —.

C. Q. }
against }
M. W. }

A business of proving, in solemn form of law, by good and sufficient witnesses, the last will and testament of W. G., late of B. P., in the county of —, deceased; promoted and brought

(n) [*Vide ante.*]

(o) [*Vide infra.*]

by *M. W.*, the executrix therein named, against *C. Q.*, the natural and lawful sister and only next of kin of the said deceased.

[On which day *Y. Z.*, in the name and as the lawful proctor of the said *M. W.*, party in this cause, exhibited the true and original last will and testament of the said *W. G.*, deceased, now remaining in the registry of this court, annexed to an affidavit of his said parties as to scripts, and marked with the letter *A.*, the said will beginning thus, “ “ ending thus, “ “ and thus subscribed, “ “ and by all better and more effectual ways, and means and methods, and to all intents and purposes in the law whatsoever, which may be most beneficial and effectual for his said parties, said, alleged, and in law articulately propounded, as follows, (to wit)

[First, That the said *W. G.*, the party in this cause deceased, having a mind and intention to make and execute his last will and testament in writing, and thereby to settle and dispose of his estate and effects, did give directions and instructions for the making and drawing thereof; and pursuant and agreeably to such directions and instructions, the very will pleaded and propounded in this cause on the part and behalf of the said *M. W.*, and marked with the letter *A.*, beginning, ending, and subscribed as aforesaid, was drawn up and reduced into writing; and after it was so drawn up and reduced into writing, the same was all read over audibly and distinctly to or by the said deceased, who well knew and understood the contents thereof, and liked and approved of the same; and in testimony of such his good liking and approbation, he, the said deceased, did, on or about the — day of —, one thousand eight hundred and —, being the day of the date of the said will, set and subscribe his name and affix his seal thereto, in manner and form as now appears thereon; and did publish and declare the same as and for his last will and testament, in the presence and hearing of divers credible witnesses, who, or at least three of whom, did in his presence, at his request, and in the presence of each other, severally set and subscribe their names as witnesses to the due execution thereof, in manner and form as now appears thereon; and he, the said deceased, did in and of his said will nominate and appoint the said *M. W.* sole executrix; and did give, will, bequeath, devise, dispose, and do in all things as in the said will is contained, and was at and during all and singular the premises of perfect, sound and disposing mind, memory and understanding, and well knew and understood what he said and did, and what was said and done in his presence, and talked and discoursed rationally and sensibly, and was fully capable of giving instructions for and of making and executing his will, or of doing any other serious or rational act of that or the like nature, requiring thought, judgment and reflection; and this was and is true, public and notorious; and so much the said *C. Q.*, the other party in this cause, doth know or hath heard, and in his conscience believes and hath confessed to be true; and the party proponent doth allege and propound every thing in this and the subsequent articles of this allegation contained jointly and severally.

[Second, That all and singular the premises were and are true, and so forth.

[Form of similar Plea, since 1st January, 1838.]

[A business of proving in solemn form of law, by good and sufficient witnesses, the true and original last will and testament of M. Y., formerly of —, but late of —, in the county of —, spinster, deceased; promoted by G. F., the sole executor named in the said will, against J. E., the nephew and one of the next of kin of the said deceased. On which day T., in the name and as the lawful proctor of the said G. F., and under that denomination, exhibited the said true and original

last will and testament of the said M. Y., the deceased in this cause, now remaining in the registry of this court, the said will beginning thus: "In the name of God, Amen: this is the last will and testament of me M. Y., of —, in the county of —, spinster:" ending thus: "In witness whereof I have hereunto set my hand this — day of —, in the year of our Lord —," and being thus subscribed, "M. Yeomans;" and by all better and more effectual ways, means and methods, and to all intents and purposes in the law whatsoever which may be most beneficial and effectual for his said party, said, alleged, and in law articulately propounded as follows, to wit:

[First, That the said M. Y., the party in this cause deceased, being of the age of twenty-one years and upwards, and of sound and disposing mind, memory and understanding, and having a mind and intention finally to settle her affairs and make and duly execute her last will and testament in writing, did give directions and instructions for the making or drawing thereof; and pursuant to such directions or instructions, the very will now pleaded and exhibited in this cause on the part and behalf of the said G. F., and now remaining in the registry of this court, and bearing date and beginning, ending and being subscribed as aforesaid, was drawn up and reduced into writing; and after the said will was so drawn up and reduced into writing, the same was read over audibly and distinctly to or by the said testatrix, who well knew and understood the contents thereof, and liked and approved of the same, and in testimony of such her good liking and approbation, she the said testatrix did, on or about the — day of —, —, being the day of the date of the said will, set and subscribe her name thereto at the foot or end thereof, in manner and form as now appears thereon, and did make or acknowledge such her signature in the presence of two or more credible witnesses present at the same time, who, or at least two of whom respectively, attested and subscribed the said will in the presence of the said testatrix, and of each other, as witnesses of the due execution thereof in manner and form as now appears thereon: That the said deceased of her said will nominated, constituted and appointed the said G. F. sole executor, and gave, willed, devised, bequeathed, disposed, and did in all respects as in the said will is contained, and was at and during all and singular the premises, of sound and disposing mind, memory and understanding, talked and discoursed rationally and sensibly, and well knew and understood what she said and did, and what was said and done in her presence, and was fully capable of giving instructions for and making and executing her last will and testament, and of doing any other serious or rational act of that or the like nature requiring thought, judgment and reflection: And this was and is true, public and notorious; and so much the said J. E., the other party in this cause, doth know or hath heard, and in his conscience believes, and hath confessed to be true:

And the party proponent doth allege and propound every thing in this and the subsequent articles of this allegation contained jointly and severally.

[Secondly, That all and singular the premises were and are true, and so forth.

How this Suit differs from the preceding one.

[*Suit by Special Allegation.*—But instead of proceeding by common *condidit*, the party propounding the will may give in a *special allegation*, detailing all the circumstances which have a tendency to establish its validity. Such allegation is previously settled by counsel, and delivered to the adverse proctor, and by him submitted to his advocate, who advises as to the expediency of opposing it or not. If he is of opinion it should be opposed, it is brought on for hearing before the court; and at this stage the facts of the case are admitted for the purpose of argument. No inconsiderable convenience and saving of expense arises from this course of proceeding; for if the court should be of opinion that, admitting these facts to be proved, the party will not be entitled to the prayer of his plea, it will reject the allegation altogether, and thus the suit is ended. Or if it be of opinion that the facts, if proved, will entitle the party to the prayer of his plea, it not unfrequently happens that the adverse party, knowing that they will be proved, abandons his opposition to the will. It is obvious how much the expense of litigation is diminished, and the advantage of suitors consulted, by this admirable and summary method of adjudicating upon the validity of a testamentary disposition, especially in the case of unexecuted papers and imperfect instruments.

Power of Residuary Legatee.

Power of Legatee.

[If an executor refuses or neglects to prove a will, the residuary legatee may apply to the court for administration with the will annexed; in order to obtain which he must take out a decree, calling upon the executor to accept or refuse probate of the will, or to show cause why administration should not be granted to the residuary legatee. Such decree may also contain an intimation that if the party does not appear, the court will, in pain of his absence, proceed to grant administration. The same process might be resorted to by a legatee; but he must cite (*p*) the residuary legatee as well as the executor; and if the residue be not disposed of he must cite the next of kin; and the court will decree administration to the parties next entitled after those parties called upon to accept or refuse or to show cause. And it may be here remarked, that a legatee performing the duty of an executor is, as a matter of course, entitled to his costs out of the estate (*q*). Such decree is served by showing the same to the party personally, or leaving with him a copy of it.

Decrees to see Proceedings.

[A next of kin, contesting a will propounded by an execu-

(*p*) [*Colvin v. Fraser*, 1 Hagg. 107.] (*q*) [See Costs, *post*, Special Part.]

tor, may take out a decree citing all persons interested under the will, to “see *proceedings* :” in the usual course of practice, such decrees issue only against the next of kin of a testator, and at the promotion of the executor, or of the person propounding the will, but in particular cases, especially where it can occasion no inconvenience to the adverse party, such a decree is granted to the next of kin (q).

[*Decree against an Executrix to bring in a Will, and to prove the same by Witnesses, otherwise to show Cause why Administration, as dying Intestate, should not be granted to the Son, and also to exhibit an Inventory, with the usual Intimation in Prerogative.*

[*T., by Divine Providence Archbishop of Canterbury, Primate of all England and Metropolitan, To all and singular clerks and literate persons whomsoever and wheresoever in and throughout our whole province of Canterbury, greeting. Whereas the Right Honourable Sir G. L., Knight, Doctor of Laws, Master, Keeper or Commissary of the Prerogative Court of Canterbury, lawfully constituted, rightly and duly proceeding, Hath, at the petition of the proctor of R. M., alleging that R. C. late of — lately departed this life, having, whilst living and at the time of his death, goods, chattels, or credits, in divers dioceses or peculiar jurisdictions, sufficient to found the jurisdiction of the said Prerogative Court of Canterbury, a widower, and, as pretended, whilst living, made his will, and therein, as pretended, left A. M., his daughter, his executrix, and also residuary legatee, as pretended in the said will, decreed the said A. M., spinster, to be cited and intimated to the effect and in manner and form as hereinafter mentioned (justice so requiring) : We do therefore authorize, empower, and strictly charge and command ye, jointly and severally, that you peremptorily cite or cause to be cited the said A. M., that she appear before the said master, keeper or commissary, or his surrogate, or any other competent judge in this behalf, in the dining room adjoining to the common hall of Doctors’ Commons, situate in the parish of St. Benedict, near Paul’s Wharf, London, and place of judicature there, on — the — day of —, between the hours of nine and twelve in the forenoon of the same day, then and there to bring in and exhibit into the registry of our said Prerogative Court the said pretended will and testament of the said deceased, and to prove the same by good and sufficient witnesses, in solemn form of law ; otherwise to show good and sufficient cause why letters of administration of all and singular the said goods, chattels, and credits, of the said deceased, as dying intestate, should not be committed and granted to the said R. M., the natural and lawful son of the said deceased ; also to exhibit a true and perfect inventory of all and singular the goods, chattels, and credits, of the said deceased, which since his death have come to her hands, possession, or knowledge, by virtue of her corporal oath, and further to do and receive as unto law and justice shall appertain, on pain of the law and contempt thereof, at the promotion of the said R. M. ; and moreover we intimate or cause to be intimated to you, the said A. M., that if you do not appear at the day, time, and place aforesaid, or, appearing, show not good and sufficient*

(q) [As to the power of a creditor, see titles *Administration*, *Wills*.]

cause to the contrary, our master, keeper or commissary aforesaid, or his surrogate, doth intend and will proceed to the granting and committing letters of administration of all and singular the goods, chattels, and credits, of the said deceased, as dying intestate, to the said R. M., on giving sufficient security, the absence, or rather contumacy of the said A. M. in anywise notwithstanding. And what ye shall do in the premises, ye shall duly certify the said master, keeper or commissary, his surrogate, or some other competent judge in this behalf, together with these presents. Dated at London the, &c.

[Process where a Decree cannot be personally served before proceeding "*in pœnam contumaciæ*."]—If there should be no opportunity of effecting a personal service of a citation or decree, proof of the fact is made by affidavit of the officer on returning the citation into court, upon which another decree issues, called a decree *viis et modis*. This decree is served if possible on the person, if not upon the house, the last known place of residence, or the church-door, and by all ways and means likely to affect the party with the knowledge of its contents. Such decree is returned into court, with the certificate of the apparitor as to the means which have been taken, and on the return of such citation *viis et modis* (p), the court proceeds *in pœnam contumaciæ*; and the proceedings thus necessarily conducted *ex parte* would be conclusive upon the party not appearing (q). An unsuccessful attempt was very recently made to enforce upon the Ecclesiastical Court the necessity of applying for a *significavit* against the non-appearing party, instead of proceeding *in pœnam* during his absence; but both the Courts of Queen's Bench and of Chancery refused a prohibition applied for on this amongst other grounds; the lord chancellor remarking, that many courts proceeded to judgments in the absence of parties who were voluntarily absent. *Vide* rules 3 & 4 of Orders of Court, *post*.

[Decree *Viis et Modis*, with Intimation in the Prerogative.

[T., by Divine Providence Archbishop of Canterbury, Primate of all England, and Metropolitan, To all and singular clerks and literate persons whomsoever and wheresoever in and throughout our whole province of Canterbury, greeting. Whereas the Right Honourable Sir G. L., Knight, Doctor of Laws, Master, Keeper or Commissary of the Prerogative Court of Canterbury, lawfully constituted, rightly and duly proceeding at the petition of the proctor of R. M., the natural and lawful son of R. M., late of — deceased (having, whilst living, and at the time of his death, goods, chattels, and credits, in divers dioceses or peculiar jurisdictions, sufficient to found the jurisdiction of this court), alleging that A. M., spinster, the executrix and residuary legatee, as

(p) [In the Arches Court a further decree would issue to see proceedings, and endeavours would be made to serve this upon the party: but this is not thought necessary in the Con-

sistory of London.—ED.]

(q) [See *Baines's case*, 1841 (*habeas corpus*), in the High Court of Chancery.—Jurist.]

pretended, of the said deceased, hath been several times diligently sought for and inquired after by the mandatory in this behalf, lawfully authorized and appointed, with a design and intent of citing her personally to the purposes hereinafter mentioned, but that she had absconded, or so concealed herself that she could not by any means be personally cited by our said mandatory, hath therefore decreed the said *A. M.*, spinster, to be cited, intimated, and called into judgment, to appear on the day and at the time and place, and for the purposes hereinafter mentioned, and in manner and form hereinafter described (justice so requiring): We do therefore authorize, empower, and strictly enjoin and command ye, jointly and severally, peremptorily to cite or cause to be cited the said *A. M.* personally, if she can be so cited, and ye can have safe and free access to her so to do, otherwise by affixing this decree for some time upon the outward door of the house or last usual place of abode of the said *A. M.*, and afterwards by affixing this decree for some time upon the outward door of the parish church where the said *A. M.* last resided, during the time of divine service, and by all other lawful ways, means, and methods whatsoever, whereby you can or may better or more effectually, so that this decree may most likely come to the knowledge of her so to be cited and intimated to appear before the said master, keeper, or commissary, his surrogate, or any other competent judge in this behalf, in the dining room adjoining to the common hall of Doctors' Commons, situate within the parish of St. Benedict, near Paul's Wharf, London, and place of judicature there, on — the — day of — next ensuing, between the hours of nine and twelve in the forenoon of the same day, then and there to bring in and exhibit into the registry of our said court the pretended last will and testament of the said deceased, and to prove the same by good and sufficient witnesses in solemn form of law; otherwise to show good and sufficient cause why letters of administration of all and singular the said goods, chattels, and credits, of the said deceased, as dying intestate, should not be committed and granted to the said *R. M.*, the natural and lawful son of the said deceased, and also to exhibit a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased, which since his death have come to her hands, possession, or knowledge, by virtue of her corporal oath, and further to do and receive as unto law and justice shall appertain, under pain of the law and contempt thereof, at the promotion of the said *R. M.*; and moreover we intimate or cause to be intimated to her the said *A. M.*, that if she do not appear at the time and place aforesaid, or, appearing, show not good and sufficient cause to the contrary, our master, keeper, or commissary aforesaid, or his surrogate, doth intend and will proceed to the granting and committing letters of administration of all and singular the goods, chattels, and credits, of the said deceased, as dying intestate, to the said *R. M.*, on giving sufficient security, the absence, or rather contumacy, of the said *A. M.* in any wise notwithstanding; and what ye shall do in the premises ye shall duly certify the master, keeper, or commissary aforesaid, or his surrogate, or other competent judge in this behalf, together with these presents. Dated at London, &c.

[*Appearance under Protest.*].—The party cited, to save his contumacy, may appear under protest, and may show cause against being cited; for instance, that the court has no jurisdiction in the subject-matter, or that he is not amenable to that

Appearance
under Protest.

jurisdiction. This preliminary objection is heard upon petition and affidavits, and either the protest is allowed and the defendant dismissed, or the protest is overruled, and the defendant is assigned to *appear absolutely*. Costs, it should be remarked, are usually given against the unsuccessful party (*r*). Either party may appeal from the decision on this preliminary point; or the defendant, should the judge decide against him on the question on jurisdiction, may apply to a court of common law for a prohibition. The law upon this subject is given under the title *Prohibition*. But it may be well to remark here, that a defendant must appear in the Ecclesiastical Court before he can move the Court of Queen's Bench for a prohibition (*s*).

[5. Suit in the Arches Court.]

Initiatory
Process in
the Arches.

[The initiatory process in the Arches Court is by citation, which is founded on letters of request, or on an appeal, except in suits for legacies (*t*), where it has original cognizance, when the will has been proved in the Prerogative Court (*u*). The first plea, as has been said, is termed a Libel in Civil, and Articles in Criminal Suits, not an Allegation, as in the Prerogative Court. In the Prerogative Court the Allegation is given in after one party has declared that he opposes, and another that he propounds a will (*x*), corresponding, as has been shown, to the plea of the common law courts. There is also this distinction (though of little practical importance) between the proceedings of the two courts. That all suits in the Arches Court are *plenary* (*y*), requiring more formalities in the mode of procedure: such as contestation of suit, the assignment by the judge of a term to propound all facts, &c.; a term to conclude; and a due form of concluding in that term, &c.]

Suits are
Plenary.

[The rule as to *appearance under protest* is the same in this court as in the Prerogative. As to proceedings *in pœnam*, a further decree issues to see proceedings after the return of the citation *viis et modis*, before the court allows the cause to be conducted *ex parte*. (*Vide ante*.) But in all other respects the same course is pursued as has been described in the Prerogative Court. See also Special Part, *Articles*.

[6. (In both Courts) Act on Petition.]

[It seems proper to mention here that a very convenient and summary mode of proceeding, called an act on petition, or an act of court, is often resorted to in both these courts for the adjudication of any incidental subject which may arise

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| (<i>r</i>) [<i>Vide post</i> , 333, " <i>Costs</i> ."] of the Archbishop of Canterbury, <i>vide</i> |
| (<i>s</i>) [<i>Ex parte Law</i> , 2 Dowl. Rep. 528.] <i>ante</i> , p. 186. |
| (<i>t</i>) [<i>Vide ante</i> , p. 183.] (<i>x</i>) [That is, contestation of suit; see <i>ante</i> .] |
| (<i>u</i>) [As to the Court of Peculiars] (<i>y</i>) [<i>Vide ante</i> , p. 186.] |

during or after the progress of a suit: such as the taxation of costs between party and party; or on a preliminary matter, such as a question of domicile; or an appearance under protest (*x*); or on the grant of an administration *pendente lite*. See form, *post*.

[An Act on Petition is the form of proceeding by which a party may be compelled before the ordinary to take upon him the office of churchwarden (*y*), and in which a cause is heard whenever application for a faculty for the alteration or removal of a church, the erection of an organ or monument, &c. is opposed (*z*).

[Of this nature, too, are proceedings in a cause, which is of rare occurrence, before the master of the faculties, where the issue of a licence for a marriage is opposed, or the creation of a notary public (*a*).

[It is competent to either party to what is technically termed *write to the act*, that is, to reply by written statements and affidavits to the statement of the adversary, under of course a liability to costs for unnecessarily protracting the suit. This mode of proceeding is very simple, consisting of statements supported by affidavits, and argued by counsel. This process is generally, though not necessarily, adopted in the High Court of Admiralty, being distinguished from the above-mentioned process of plea and proof, by this important distinction, that it allows no cross-examination, or enforcement of the attendance of witnesses.

[Form of Act on Petition and Reply (*b*).

[Dated the Fourth Session of Trinity Term, to wit, —, the — day of —, in the year of our Lord —.

Wood and others against Goodlake and Helps.

(Barlow.

Toker.

Pulley.)

(P. is assigned to exhibit a proxy, and to declare whether he will propound the script marked (B.)

[On which day P., as the proctor for T. H. esq., referring to the decree or order of this court, sped in this cause on the second session of this term, to wit, —, the — day of this present month of —, objected to letters of administration of the goods, chattels, and credits of the said deceased, pending suit, passing the seal of this court, and prayed to be heard on his petition, and alleged that this is a cause of proving in solemn form of law certain paper writings as the last will and testament, and also a codicil of J. W., late of the city of G., esq., deceased; promoted by M. W. esq., J. C., J. O., and J. S. esqrs. as the executors named in the said first-mentioned paper writings, against E. G., widow,

Act on Petition.

(*x*) [See p. 187.]

Notary Public.]

(*y*) [See title Archdeacon, vol. i. p. 97.]

(*b*) [An objection to the grant of a limited administration *pendente lite*, in the recent case of Mr. Wood. See an account of this cause, *post*, under Evidence, Special Part.]

(*z*) [See title Church, vol. i. 362 *a*, and 363, &c.]

(*a*) [See titles Faculties and

asserted to be the second cousin and only next of kin of the said deceased ; and also against T. H. esq. and others, legatees named in such aforesaid codicil : And he further alleged, that in and by the aforesaid act the letters of administration applied for by the said L. are for the purpose, and limited during the dependence of the aforesaid cause ; and limited to the receiving the rents due to the said deceased and the management of the leasehold estates ; and the selling out and receiving the proceeds of the sum of four thousand two hundred and forty-three pounds sixteen shillings, new annuities ; and to the payment of all such sum or sums of money as appear on the books of the said deceased to be now due and owing by the said deceased from his banking establishment in the said city of Gloucester, until a definitive sentence or final decree shall be given or promulged in the said cause or business, or otherwise, as may be most beneficial to the person or persons entitled to the said deceased's personal estate and effects, or under such other limitations as the said court may be pleased to direct : Whereas the said P. alleged that the sole purpose for, or in respect of which such aforesaid letters of administration are as alleged by L. required, is for the purpose of paying and discharging the several balances due to divers persons by the said J. W. the party in this cause, in respect to their banking account with him at the time of his death, amounting to the sum of seventy thousand pounds, or thereabouts ; which said debts, the said P. humbly submitted, ought, in the first instance, to be defrayed or reimbursed by and out of ready money, or any other tangible and immediate funds or securities in the same manner as he, the said deceased, during his lifetime, was in the habit of applying for such banking purpose, or was at the time of his decease possessed of, or otherwise entitled to : And the said P. further alleged that it doth appear in and by a certain affidavit duly made and sworn to by J. P., esq. bearing date the — day of — last, brought into and now remaining in the registry of this court, that there was due and owing to the said deceased at the time of his death on account of his aforesaid banking establishment divers debts, although the amount thereof is not therein specified ; but that it does not therefrom, or from any other evidence in this cause, appear that the said deceased had not sufficient sums of ready money, either in his own banking house at G. or elsewhere, or any sufficient balance to his credit at his agents, Messrs. Sir J. L. and Company, of L., bankers, to discharge the before-mentioned sum of seventy thousand pounds, or thereabouts, although it is believed the said deceased had very considerable and sufficient sums at the time of his decease applicable to such purpose, without the sale of the before-mentioned new annuities : And the said P. further alleged, that it is in no way necessary to the payment and discharge of the before-mentioned sum of seventy thousand pounds, due as aforesaid, that the rents to become due in respect of the leasehold estates of which the said deceased died possessed should be appropriated, nor can the same be appropriated in the immediate discharge of the demands due on the said deceased's estate, touching his bank establishment ; that the said leasehold houses and premises are not in need of immediate repair, nor require any person to superintend and direct the management of the same ; and that the management of such aforesaid leasehold estates, the receipt of the rents to become due, nor the sale of such new annuities ought to be included in the limitations to be contained in the administration applied for by the said L. for the purpose aforesaid : Wherefore the said P. objected

to such aforesaid letters of administration being decreed to the extent and under the limitations as contained in the aforesaid act of court, by the said L. sped: And further, humbly submitted that in the event of this honourable court being pleased to decree letters of administration pending this suit, to which, under proper limitations, the said P. offers no objection, that the same should be granted to some fit and proper and impartial person, to be nominated by his said parties, jointly with the other parties interested in the issue of this said suit: Whereas the administrator proposed by the said L. is the son-in-law of the said M. W., and has taken an active part and evinced much interest in the present proceedings; and he prayed the right honourable the judge of this court to decree an inventory or statement, on oath, of all ready money and other tangible funds, and of all securities applicable in the first instance to the payment and discharge of such sum and sums of money due and owing by the said deceased, to the several persons who kept accounts with the deceased as banker, to be exhibited and brought into the registry of this court, on oath, previous to any administration whatever, pendente lite, being decreed.

[In the presence of B., dissenting and denying that the sole purpose Reply. for or in respect of which letters of administration pending suit are required in this cause, is, as falsely alleged by P., for the mere purpose of paying and discharging the several balances due to divers persons by J. W. esq., the party deceased in this cause, in respect to his banking account, inasmuch as he expressly alleged that the said deceased at the time of his death was possessed of certain leasehold houses and premises, situate in or near the city of G. (though of the value only, as he also expressly alleged, of eight thousand seven hundred pounds, or thereabouts), considerable arrears of rent due upon which were due and owing to the said deceased at the time of his death, and which said houses and premises are in present want of very considerable repairs, as also other management and superintendence.

[And B. further alleged, that the debts due and owing from the said deceased to divers persons, in respect to their banking account with him at the time of his death, amounted to the sum of seventy thousand pounds or thereabouts, and that the only tangible property left by the said deceased, immediately available for the payment of such debts, consisted of the sum of five thousand and seventy pounds, at the time of his death, in his banking-house, in the said city of G., and of the sum of nine thousand six hundred and forty-nine pounds, or thereabouts, in the hands of his town agents, Messrs. L. and Company, of which latter sum his said agents have since paid the sum of eight thousand six hundred and nine pounds, or thereabouts, for outstanding bills and notes which have become due since the death of the said deceased, made payable at their house.

[And B. further alleged, that the administration pending suit heretofore decreed by the right honourable the judge, at the suit of his parties, the executors of the said deceased, was prayed to be granted, either to E. M., doctor of laws, or to Sir J. L., or to the two jointly, as the court might think fit; and that it was represented to the said judge, as the truth and fact was and is, that the said Dr. M., from his residence on the spot, was most likely to discharge efficiently the duties of an administrator pending suit; whereupon the judge was pleased to decree the said administration to the said Dr. M.: And he further

alleged, that the said Dr. M. is barrister-at-law of ten years' standing, and is also chancellor of the diocese of G., and is a person to whom no reasonable objection is or can be raised on the part of the said P. Wherefore he prayed the right honourable the judge to confirm the aforesaid order or decree in the premises, made and interposed on the second session of this present Trinity Term, to the said Dr. M., he having been already sworn, and having complied with the said order or decree, by giving justifying security for one hundred and sixty thousand pounds, and having also exhibited a declaration instead of an inventory of the said limited goods, chattels, and credits of the said deceased, and the letters of administration under the limitations therein decreed having been already filled up and duly stamped, and to condemn P.'s said party in the costs of this petition.

Answer to
Reply.

[In the presence of P., dissenting and denying as before, and further alleging, that it now appears, from the allegation of the said B., that the cash and other tangible funds of the said deceased, alone amount to the sum of fourteen thousand seven hundred pounds, and upwards, thus rendering a sale of the deceased's funded property unnecessary, at least to the extent applied for.

[In the presence of B., alleging and praying as before, by him prayed, whereupon the right honourable the judge assigned to hear his pleasure thereon whensoever.

P.
B.

[7. (In both Courts) Hearing, Judgment—Sentence.

Publication
of Evidence.

[The evidence on both sides being published, the cause is set down for hearing.

[All the papers, the pleas, exhibits, interrogatories and depositions, are delivered to the judge; who, having them in his possession for some days before the cause is opened, has a full opportunity of perusing and carefully considering the whole evidence, and all the circumstances of the case, and of preparing himself for hearing it fully discussed by counsel.

Hearing.

[All causes are heard publicly in open court; and on the day appointed for the hearing, the cause is opened by the counsel on both sides, who state the points of law and fact (n) which they mean to maintain in argument; the evidence is then read, unless the judge signifies that he has already read it, and even then particular parts are read again, if necessary, and the whole case is argued and discussed by the counsel.

Judgment.

[The judgment of the court is then pronounced upon the law and facts of the case; and the judge publicly in open court assigns the reasons for his decisions, stating the principles and authorities on which he decides the matters of law, and reciting or adverting to the various parts of the evidence from which he deduces his conclusions of fact; and thus the matter in controversy between the parties becomes adjudged.—ED.]

(n) [Technically called *Informations*. See form of minutes in a cause, *post.*—ED.]

By the ancient canon law, sentence of suspension or ex-communication ought not to be given without a previous admonition: unless the offence is such as in its own nature immediately requires such sentence. In Archbishop Arundel's Register, mention is made of an appeal from a sentence of suspension, as unjust for want of a canonical admonition (*o*). Sentence.

And every sentence must be in writing; otherwise it deserves not the name of a sentence, and needeth not the formality of an appeal to reverse it (*p*).

And the sentence must be pronounced in the presence of both parties; otherwise sentence given in the absence of one of the parties is void (*q*).

A sentence is either *definitive* or *interlocutory*:

A *definitive* sentence is that which puts an end to the suit in controversy, and regards the principal matter in question: Definitive.

An *interlocutory* sentence determines only some incident or emergent matter in the proceeding, as some exception, or the like, but doth not affect the principal matter in controversy (*r*). Interlocutory.

[But according to modern practice, frequent use is made in the Arches Court and Prerogative Court of what is termed a *final* interlocutory decree; and the only difference between this and a sentence is, that the one (the sentence) is a decree itself under the hand of the judge making it; and that the other, the interlocutory decree (*s*), (and which should express that it is to have the force of a written sentence,) is merely the statement of the registrar, who is a notary public, that a decree (to such an effect or in such terms) *was made* by the judge. They are both equally effective, and therefore sometimes one is had and sometimes the other; but it is obvious that the interlocutory in its nature is in reality but a species of secondary evidence. Final Interlocutory Decree.

[Form of a Sentence.]

[In the name of God, Amen: *We, H. J., Knight, Doctor of Laws, Dean or Commissary of the Deanries of the Arches London, Shoreham, and Croydon, the peculiar and immediate jurisdiction of the cathedral and metropolitical church of Christ, Canterbury, lawfully constituted, rightly and duly proceeding, having heard, seen and understood, and fully and maturely discussed the merits and circumstances of a certain cause of divorce or separation from bed, board and mutual cohabitation, promoted and brought by A. L. against T. L. her lawful husband, of the parish of —, in the county of —, and deanry of — aforesaid, by reason of adultery by him committed: and the said A. L. and T. L.*

(*o*) Gibs. 1046.

(*p*) Ibid. 1047. That is, by the canon law, must be reduced to writing, and then pronounced in the presence of the parties by the judge standing. C. 2, 1, 8; C. 3, 9, 11; Inst. J. C. 3, 15. It may be pleaded briefly in the

temporal courts, without showing the manner thereof and of their proceedings. Freem. 84; 2 Bulstr. 182.

(*q*) Gibs. 1047.

(*r*) Ayl. Par. 487.

(*s*) [See form, *post*.]

lawfully appearing before us in judgment by their proctors and the proctor of the said A. L., praying sentence to be given for and justice to be done to his party; and the proctor of the said T. L. praying.

[And we, having carefully and diligently searched into and considered the whole proceedings had and done before us in the said cause, and having observed all and singular the matters and things that by law in this behalf ought to be observed, have thought fit and do thus think fit to proceed to the giving our definitive sentence or final decree in the said cause: Forasmuch as by the acts enacted, deduced, alleged, exhibited, propounded and proved in the said cause, we have found that the proctor of the said A. L. hath sufficiently founded and proved his intention deduced in a certain libel (with an exhibit) thereto annexed, given in and admitted in the said cause, and now remaining in the registry of the court of the said peculiar jurisdiction; which said libel and exhibit we take and will to have taken as if here read and inserted for us to pronounce as hereinafter is pronounced; and that nothing effectual in law hath on the part of the said T. L. been excepted, deduced, alleged, propounded, proved or confessed in the said cause, which ought in anywise to defeat, prejudice or weaken the aforesaid intention of the proctor of the said A. L.: Therefore we, H. J., Doctor of Laws, the judge aforesaid, having heard counsel in this behalf, do pronounce, decree and declare that the said T. L. and the said A. L. formerly C. widow, being free from all matrimonial contracts and engagements, save to each other, did at the time and place libellate, contract true, pure and lawful marriage with each other, and did solemnise or cause the same to be solemnised in the face of the church, and afterwards consummated the same marriage by carnal copulation; and that they the said T. L. and A. L. were and are lawful husband and wife, and for and as such were and are commonly held, reputed and taken to be: And we do also pronounce, decree and declare according to the lawful proofs made before us in the said cause, that the said T. L. after the solemnisation of the said marriage, being altogether unmindful of his conjugal vow, and not having the fear of God before his eyes, but being instigated by the devil, did at the times and places libellate, or some of them, commit the crime of adultery, and did thereby violate his conjugal vow: wherefore and by reason of the premises, we do pronounce, decree and declare that the said A. L. ought by law to be divorced and separated from bed, board and mutual cohabitation with the said T. L. her said husband, until they shall be reconciled to each other; and we do by these presents divorce and separate them accordingly, bond having been given on the part and behalf of the said A. L. according to the tenor of the canon in that behalf made and provided, that the said A. L. shall not contract any other marriage while the said T. L. shall be living; intimating nevertheless, and by such intimation expressly inhibiting according to the ecclesiastical laws and canons made in that behalf, as well the said A. L. as the said T. L., that neither of them in the lifetime of each other shall in anywise attempt or presume to contract any other marriage by this our definitive sentence or final decree, which we read and promulge by these presents.]

[This the registrar attests, as having been signed by the judge on the particular day.]



[8. Form of Minutes in a Cause of Divorce, as taken down in the Assignation Book of the Registry.

[Lavender v. Lavender otherwise Lamb.

Caveat day,
4th Session, 1838. } S. exhibited a special proxy (s) under the hand
and seal of his party, and returned citation certificate to caveat day in October.

Caveat day,
2d October. } Certificate continued (t).

1st Session,
Michaelmas Term,
2nd Nov. 1838. } Same.

2nd Session,
9th Nov. 1838. } J. H. B. appeared (u) for T. L. otherwise L.,
the party cited, and exhibited proxy under his
hand and seal; present S., who brought in libel
with one exhibit annexed, marked No. 1, on admission the next court, present B. and S.

3d Session,
Michaelmas Term,
19th Nov. 1838. } Libel and exhibit admitted at petition of S.,
present P. for J. H. B., not opposing same;
and he then confessed the marriage as pleaded,
but otherwise contested suit negatively; S. to
prove the by day, requisition, commission, examination of witnesses, compulsories, and decree of confrontation, S. (x)

By day,
4th Dec. 1838. } S. to prove; continued to 1st Session next
Term.

Friday,
14th Nov. 1838,
before Dr. H. } S. produced as witnesses on his libel and exhibit J. L. and M. L. wife of the said J. L.,
M. M. S. wife of J. S., and C. M. widow, who
were sworn and monished as usual; present B.,
who produced T. L. otherwise L., who declared
himself to be the party proceeded against in
this cause.

On Friday, the
21st Nov. 1838. } S. produced as witnesses on his libel S. P.
wife of W. P., the reverend R. S. and W. G. F.,
who were sworn and monished as usual; present B., who produced T. L. otherwise L., who
declared himself to be the party proceeded
against in this cause.

Thursday,
10th Jan. 1839. } S. produced as a witness on his libel G. T.,
who was sworn and monished as usual; present B.

1st Session,
Hilary Term. } S. is to prove—continued.

2d Session,
Hilary Term,
21st Jan. 1839. } S. brought an allegation of faculties on admission the next court, and then without prejudice to the question of alimony pending suit,
which is reserved, prayed, and the judge at his

(s) [See title Proctor, in this volume.]

(t) [That is to say, the party cited is allowed further time to appear.]

(u) [This is technically called giving an appearance.]

(x) [Vide post, SPECIAL PART, Evidence.]

[Practice—Form of Minutes in a Cause.]

petition decreed, publication; present F. S. for B., who declared he should give no allegation unless exceptive to the testimony of witnesses. On admission of such allegation, if any, next court, S.; F. S. for B.

3d Session,
29th Jan. 1839.

} The allegation of faculties is admitted at petition of S.; present S. for B. not opposing same; B. is assigned to give in his client's answers the 4th session. Shepherd porrected bill of costs, and made oath as usual. The judge, at the report of W. T., the actuary assumed, taxed the same at the sum of 20l. 4s. 10d. Motion for Shepherd.

4th Session,
7th Feb. 1839.

} B. declared he should not give any exceptive allegation: whereupon the judge, at petition of S., assigned the cause for informations and sentence the by day, saving the answers of B.'s party to the allegation of faculties and the allotment of alimony pending suit; present I. for B.; J. for S.

[Form of Minute on bringing in Answers.]

[Number of session, { Appeared personally ———, party in this
day of month, { cause, and in the presence of [defendant's proc-
year. { tor] produced himself for his answers to the
libel given in and admitted in this cause, and was sworn as usual, and then brought in his answers in writing, subscribed with his name, and acknowledged such subscription thereto to be of his proper handwriting, and the said answers to be true, agreeably to the oath by him so taken. Present ———.

[Form of Minute when a Sentence is porrected.]

[Number of session, { [Plaintiff's proctor] alleged that bond had
day of month, { been given, and he then porrected a definitive
year. { sentence in writing, which for his party he
prayed to be read, signed, promulged and given; [defendant's proctor] prayed the right honourable the judge to pronounce that plaintiff's proctor had failed in proof of the libel admitted in this cause, and to dismiss his (defendant's) party from this suit, and all further observance of justice therein. The judge having read the proofs and heard advocates and proctors on both sides, read, signed, promulged and gave the sentence by [plaintiff's proctor] porrected, pronouncing, decreeing and declaring as is therein contained.

[Form of Minute when no Sentence is porrected, but when a Final Interlocutory Decree, having the effect of one, is taken instead,

[Number of session, { [Plaintiff's proctor] alleged that his party
day of month, { had given the usual bond, and prayed the right
year. { honourable the judge to pronounce that he had
fully proved the contents of the libel and exhibit by him given and admitted in this cause on the part and behalf of ———, his party, and

to decree the said — to be divorced from bed, board and mutual cohabitation with — his wife (defendant's proctor's party), by reason of the adultery by her committed; [defendant's proctor] prayed the right honourable the judge to pronounce plaintiff's proctor had failed in proof of the libel and exhibit aforesaid, and to dismiss his party the said — from this suit, and all further observance of justice therein. The right honourable the judge, having read the proofs and heard advocates and proctors on both sides, by his interlocutory decree, having the force and effect of a definitive sentence in writing, pronounced, decreed and declared that plaintiff's proctor had sufficiently proved the contents of the aforesaid libel and exhibit, and that — and —, the parties in this cause, were lawful husband and wife, and that she the said — had committed adultery as charged in the said libel, and that by reason thereof the said — ought by law to be divorced or separated from bed, board and mutual cohabitation with the said —; and the judge did divorce and separate them accordingly.

[9. Execution of Sentence.

[The execution of the sentence, in case there be no appeal interposed, is either completed by the act of the court itself,—such as by granting probate or administration, or signing a sentence of separation—or remains to be completed by the act of the party, as by exhibiting an inventory and account, by payment of the tithes sued for, and other similar matters, in which cases *execution* is enforced by the compulsory process of *contumacy*, *significavit* and *attachment*.]

When there is no Appeal.

[The act of the 53 Geo. 3, c. 127, abolished for the future the power of excommunicating, as a means of enforcing any civil process; and in lieu thereof empowered the ecclesiastical judge to pronounce the disobedient party “contumacious and in contempt,” and within ten days “to signify” the same to the Court of Chancery, which was then directed to grant a writ *de contumace capiendo*, substituted by this act for the writ *de excommunicato capiendo* of 5 Eliz. c. 23. The 2 & 3 Will. 4, c. 93, greatly enlarged the power of the Ecclesiastical Courts in England and Ireland to enforce their process, extending it beyond the limits of their usual jurisdictions, and rendering it available against *privileged* persons, by enabling the English and Irish Courts of Chancery to sequester the real and personal estate of a privileged contumacious party for the payment of money ordered by the Ecclesiastical Court. See these statutes under the title *Excommunication*, vol. ii. p. 260. Lastly, the 3 & 4 Vict. c. 93 (a), empowered the Ecclesiastical Courts to order, under certain circumstances, the release of persons imprisoned under a writ *de contumace capiendo*. The statute intituled “An Act to

Writ *De Contumace Capiendo*.

Privileged Persons.

When Ecclesiastical Court may order the Release of Parties imprisoned.

(a) [This act was passed after the second volume of this work had been printed.]

amend the Act for the better Regulation of Ecclesiastical Courts," and it enacts as follows:—

Power of Release under 3 & 4 Vict. c. 93. Privy Council may order Discharge of Persons in Custody under Writ *De Contumace Capiendo*.

Proviso.

["Whereas it is expedient to make further regulations for the release of persons committed to gaol under the writ *de contumace capiendo*: be it enacted, that after the passing of this act it shall be lawful for the judicial committee of her Majesty's most honourable privy council, or the judge of any ecclesiastical court, if it shall seem meet to the said judicial committee or judge, to make an order upon the gaoler, sheriff, or other officer in whose custody any party is or may be hereafter, under any writ *de contumace capiendo* already issued or hereafter to be issued, in consequence of any proceedings before the said judicial committee or the judge of the said ecclesiastical court, for discharging such party out of custody; and such sheriff, gaoler, or other officer shall on receipt of the said order forthwith discharge such party: Provided always, that no such order shall be made by the said judicial committee or judge without the consent of the other party or parties to the suit: Provided always, that in cases of subtraction of church rates for an amount not exceeding five pounds where the party in contempt has suffered imprisonment for six months and upwards, the consent of the other parties to the suit shall not be necessary to enable the judge to discharge such party, so soon as the costs lawfully incurred by reason of the custody and contempt of such party shall have been discharged, and the sum for which he may have been cited into the ecclesiastical court shall have been paid into the registry of the said court, there to abide the result of the suit; and the party so discharged shall be released from all further observance of justice in the said suit."

Form of Order.

[Sect. 2. "That any such order may be in the form given in the schedule annexed to this act."

SCHEDULE.

Warrant of Discharge.

["To the sheriff [gaoler, or keeper, as the case may be] of in the county of .

["Forasmuch as good cause hath been shown to us [or me] [here insert the description of the judicial committee or judge, as the case may be,] wherefore A. B. of —, now in your custody, as it is said, under a writ *de contumace capiendo*, issued out of [here insert the description of the court out of which the writ issued], in a suit in which [here insert the description of the parties to the suit], should be discharged from custody under the said writ; we [or I], therefore, with the consent of the said [here insert the description of the parties consenting], command you, on behalf of our sovereign lady the Queen, that if the said A. B. do remain in your custody for the said cause and no other, you forbear to detain him [or her] any longer, but that you deliver him [or her] thence, and suffer him [or her] to go at large, for which this shall be your sufficient warrant.

["Given under the seal of at the day of , in the year of our Lord .

["A. B. registrar, or deputy registrar, or, as the case may be."]

[The 3 & 4 Will. 4, c. 41, had before empowered the Judicial Committee to enforce their decrees in the same manner as the inferior Ecclesiastical Courts, enacting by section 28,

Execution of Sentence by Judicial Committee.

["That the said judicial committee shall have and enjoy in all respects such and the same power of punishing contempts and of compelling appearances, and that his majesty in council shall have and enjoy in all respects such and the same powers of enforcing judgments, decrees, and orders, as are now exercised by the High Court of Chancery or the Court of King's Bench (and both *in personam* and *in rem*) or as are given to any court ecclesiastical by an act of parliament passed in a session of parliament of the second and third years of the reign of his present majesty, intituled 'An Act for enforcing the Process upon Contempts in the Courts Ecclesiastical of England and Ireland;' and that all such powers as are given to courts ecclesiastical, if of punishing contempts or of compelling appearances, shall be exercised by the said judicial committee, and if of enforcing decrees and orders shall be exercised by his majesty in council, in such and the same manner as the powers in and by such act of parliament given, and shall be of as much force and effect as if the same had been thereby expressly given to the said committee or to his majesty in council."]

Power of enforcing Decrees.

2 & 3 Will. 4, c. 93.

[Form of Significavit.]

[To his most excellent Majesty and our Sovereign Lord William the Fourth, by the Grace of God of the United Kingdom of Great Britain and Ireland King, Defender of the Faith. William, by Divine Providence Archbishop of Canterbury, Primate of all England and Metropolitan. Health in him by whom kings and princes rule and govern. We hereby notify and signify unto your Majesty, That one J. T., of —, in the county of —, hath been duly pronounced guilty of manifest contumacy and contempt of the law and jurisdiction ecclesiastical, in not appearing before — [or "in not obeying the lawful commands of —,"] [or "in having committed a contempt in the face of the court of —, lawfully authorized by —,"] on a day and hour now long past, in a certain cause of proving in solemn form of law, by good and sufficient witnesses, the last will and testament of A. B., late of L.

[We therefore humbly implore and entreat your said most excellent Majesty would vouchsafe to command the body of the said J. T. to be taken and imprisoned for such contumacy and contempt. Given under the seal of our court the — day of —.]

C. D.	} Deputy	
J. J.		Registers.
W. F. G.		

[Form of Writ De Contumace Capiendo.]

[William, &c. To the sheriff of —, greeting. The — hath signified to us that J. T. of —, in your county of —, is manifestly contumacious and contemns the jurisdiction and authority of —, nor will he submit to the ecclesiastical jurisdiction: but forasmuch as the royal power ought not to be wanting to enforce such jurisdiction, We command you that you attach the said J. T. by his

body, until he shall have made satisfaction for the said contempt ; and how you shall execute this our precept notify unto —, and in nowise omit this ; and have you there this writ. Witness ourself at Westminster, the — day of —, in the — year of our reign.

[Form of Writ of Deliverance.

[Whereas J. T., of —, in your county of —, whom lately at the denouncing of — for contumacy, and by writ issued thereupon you attached by his body, until he should have made satisfaction for the contempt. Now he having submitted himself, and satisfied the said contempt, we hereby empower and command you, that without delay you cause the said J. T. to be delivered out of the prison in which he is so detained, if upon that occasion and no other he shall be detained therein. Given under the seal of our — of —, this — day of —, in the year of our Lord one thousand eight hundred and thirty-five.

C. D. } Deputy
J. J. } Registers.]
W. F. G.

10. Inhibition—Attentat—Appeal.

Inhibitions,
what,

An Inhibition is a writ to forbid a judge from farther proceeding in a cause depending before him, being in nature of a prohibition (b).

And this writ most commonly issueth out of an higher Court Christian to an inferior, upon an appeal (c).

But there are likewise inhibitions on the visitations of archbishops and bishops : thus, when the archbishop visits, he inhibits the bishop ; and when a bishop visits, he inhibits the archdeacon : and this is to prevent confusion (d).

Canons re-
specting.

By can. 96, "That the jurisdiction of bishops may be preserved (as near as may be) entire and free from prejudice, and that for the behoof of the subjects of this land better provision be made, that henceforward they be not grieved with frivolous and wrongful suits and molestations, it is ordained that no inhibition shall be granted out of any court belonging to the archbishop, at the instance of any party, unless it be subscribed by an advocate practising in the said court. And the like course shall be used in granting forth any inhibition at the instance of any party, by the bishop or his chancellor, against the archdeacon or any other person exercising ecclesiastical jurisdiction. And if in the court or consistory of any bishop there be no advocate at all, then shall the subscription of a proctor, practising in the same court, be held sufficient."

And by can. 97, "It is further ordered and decreed, that henceforward no inhibition be granted by occasion of any

(b) Terms of the Law.

(c) Ibid.

(d) Ibid. [See title Deans and

Chapters, for Archbishop's Visitation of a Cathedral.]

interlocutory decree, or in any cause of correction whatsoever, except under the form aforesaid. And moreover, that before the going out of any such inhibition, the appeal itself, or a copy thereof (avouched by oath to be just and true), be exhibited to the judge or his lawful surrogate, whereby he may be lawfully informed both of the quality of the crime and of the cause of the grievance, before the granting forth of the said inhibition. And every appellant, or his lawful proctor, shall, before the obtaining of any such inhibition, show and exhibit to the judge or his surrogate, in writing, a true copy of those acts wherewith he complaineth himself to be aggrieved, and from which he appealeth; or shall take a corporal oath that he hath performed his diligence and true endeavour for the obtaining of the same, and could not obtain it at the hands of the register in the country, or his deputy, tendering him his fee. And if any judge or register shall either procure or permit any inhibition to be sealed, so as is said, contrary to the form and limitation above specified, let him be suspended from the execution of his office for the space of three months; and if any proctor, or other person whatsoever by his appointment, shall offend in any of the premisses, either by making or sending out any inhibition contrary to the tenor of the said premisses, let him be removed from the exercise of his office for the space of a whole year, without hope of release or restoring."

Canon respecting Inhibition.

[If an appeal be interposed from a grievance inflicted, or a definitive or interlocutory sentence pronounced by an inferior judge, an inhibition is first to be requested from the judge to whom it is appealed; this inhibition usually contains a citation for the party who obtains the sentence, or at whose petition the grievance was imposed (called the party appellate), to answer in a cause of appeal; and, by virtue of this inhibition, the judge from whom it is appealed, his register, and the party appellate, are to be inhibited, that they proceed not further to the execution of the sentence pronounced against the appellant while this appeal depends, nor do any thing to his prejudice; and this inhibition is to be certified to the judge to whom it is appealed, with a certificate thereupon, mentioning what day the party and judge were inhibited, and on what day the party appellate was cited to answer in this cause of appeal. There is also issued a monition for the transmission of the process in the court below, which is a separate instrument. The inhibition contains the substance of what is subsequently set forth in the libel of appeal, which is called, the *præsertim* of the appeal. The court, it should be observed, is not legally obliged to defer to an appeal till an inhibition is served; nor is there any distinction whether all the acts be done on the day on which the appeal is asserted, or some on a subsequent day. And when the court has over-

When an Inhibition must precede an Appeal.

Its Contents.

Monition for Transmission of Process.

Effect of Inhibition.

Effect of
Inhibition.

ruled objections to the admission of an allegation, it has admitted the allegation on the following court day, notwithstanding an appeal had in the *interim* been asserted (e). The general inclination of the court is to defer to the appeal; but it will not do so where the delay may defeat the ends of justice (f). It has been held that the 97th canon inferred a discretion in the judge to grant or refuse his inhibition (g).

[Form of Inhibition from the Judicial Committee of the Privy Council.]

[Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, To all and singular our liege subjects, being literate persons, whomsoever and wheresoever in and throughout our said united kingdom, greeting. Whereas a certain cause or business of appeal was lately depending in judgment before our right trusty and well beloved councillor Sir H. J., Knight, Doctor of Laws, Official Principal of the Arches Court of Canterbury, promoted by J. C. of —, in the county of —, Esq. the appellant, of the one part, and E. C., his wife, the respondent, of the other part, and which was in the first instance a cause of divorce by reason of alleged cruelty and adultery depending in the Consistorial Court of London, and therein promoted by the said E. C. against the said J. C.: And whereas the said Sir H. J. did, on the — day of — last, pronounce against the said appeal, affirm the sentence appealed from, and remit the cause, from which said decree an appeal was and is duly made and interposed on the part and behalf of the said J. C. to us in council: And whereas we have been pleased to refer the said appeal to the Judicial Committee of our Privy Council: And whereas the Worshipful J. H., Doctor of Laws, one of the surrogates of the said Judicial Committee lawfully appointed, hath decreed an inhibition and citation to the effect following (justice so requiring): We do therefore authorize and empower, and strictly charge and command you, jointly and severally, that you do inhibit or cause to be inhibited the said Sir H. J., the judge aforesaid from whom the said cause is appealed, his surrogate, registrar or actuary, and the said E. C. in special, and all others in general, whom by the tenor hereof we so inhibit, that neither they nor either of them pending the said appeal do or attempt any thing to the prejudice of the said party appellant, or his said cause of appeal, but that he may have full liberty and power to proceed in and prosecute the same so long as it shall remain undecided, under pain of the law and contempt thereof; and that you also cite or cause to be cited the said E. C., that she appear personally or by her proctor lawfully appointed before the said Judicial Committee, or any four or more of them, in the Privy Council Chamber, Whitehall, on the sixth day after service of these presents, if it be a court day, otherwise before their Lordships' Surrogate, in the Common Hall of Doctors' Commons, situate in the parish of Saint Benedict, near Paul's Wharf, London, on the next court held there, between the usual hours for hearing causes there, then and there to answer unto the said J. C. in the said cause of appeal, and further to do and receive as unto law and justice shall

(e) [Middleton v. Middleton, 2 v. Donegal, 1 Add. 21.]
Hagg. 141, Suppl. in notis.] (g) [Herbert v. Herbert, 2 Phill.
(f) [See last case, and Chichester 437.]

appertain, under pain of the law and contempt thereof; and what you shall do or cause to be done in the premises you shall duly certify the said Judicial Committee, or any four or more of them, or their surrogate, together with these presents. Given at —, (under the seal which we use in this behalf,) the — day of —, in the year of our Lord —, and of our reign the —.

[An *attentat*, in the language of the civil and canon laws, is any thing whatsoever wrongfully innovated or attempted in the suit by the judge *à quo*, pending an appeal; but steps taken by the judge *à quo* on the same court day, but after an appeal entered, and subsequent thereto, but prior to the service of the inhibition (the appellant not being *founded* in his first appeal), are not held to constitute an *attentat* (g). Attentat.

[All the several acts of one court day constitute, with reference to *attentats*, but one act, notwithstanding an appeal intermediate between those acts (h).

[Appeals, as laid down in the books, are said to be of two kinds, that is to say, they are judicial or extra-judicial; the first from the sentence, the last from the acts and the extra-judicial decrees. The judicial appeal is made from the sentence of the judge, which is either definitive or interlocutory. The extra-judicial appeal may be interposed upon such *grievances* as any one may suffer, either by the judge's deferring to pronounce sentence or rejecting some material evidence, or immoderate taxation of charges; sometimes, though rarely, from condemnation (i) in costs; from the granting too short a time or delay wherein to do any act, &c., and also, as laid down in the books, from an unjust excommunication upon a false certificate of the citation, and denying the service to any one. Appeals :
1. Judicial.
2. Extra-judicial.

[An appeal must be instituted within fifteen days, and prosecuted within a year or year and a day from the date of the delivery of the sentence. There are three methods by which it may be instituted : Modes of instituting Appeal.

[1. By an appeal asserted *vivâ voce*, before the judge and the registrar in open court, at the time of the delivery of the sentence, called an appeal *apud acta*, because taken down by the registrar in the act of court in the following form : "A. B. protested of a grievance and of appealing, and instantly appealed."

[2. By a protocol of appeal, which is an instrument attested by a notary public in the presence of two credible witnesses, or of one other notary (k), containing an outline of the proceedings in the court below, that is to say, such particulars as the time, place, judge, parties, and tenor of sentence.

[3. By what must be called, for the sake of distinction, the appeal itself, viz. a more extended form of statement than the

(g) [*Chichester v. Donnegal*, 1 Add. Rep. 22.]

(h) [*Ibid.*]

(i) [*Lloyd and Clarke v. Poole*, 3 Hagg. 477. *Vide post*, Costs.]

(k) [See form, *post.*]

protocol, but signed and witnessed by the same persons; and which before the 5 Geo. 4, c. 41, required a 15*l.* stamp.

Where nothing remains to be done after Sentence.

Where something remains to be done.

Power of the Judge *à quo*.

Of the Judge *ad quem*.

[Such being the different methods of instituting an appeal, it should be further observed, that where a definitive sentence or final interlocutory decree has been pronounced, and where *nothing further remains to be done* for the purpose of carrying the same into execution, as may be the case in matrimonial suits, the proctor, against whose party sentence is given, may, *within fifteen days*, enter a protocol before a notary public, and may prosecute his appeal by applying to the superior court for an inhibition at any time within a year, or, as some suppose, a year and a day, from the delivery of the sentence; but if *any thing remains to be done* by the court after sentence, in order to carry it into effect, as by grant of probate or administration, by enforcing restitution of conjugal rights, payment of church rate, or of costs pronounced for, there being no appeal alleged *apud acta*, the party submitting to such judicial acts or orders would be barred of his right of appeal. Nor can the court (*b*) *à quo* dismiss, or perempt, or, otherwise than as above mentioned, affect the right of appeal where it *has* been alleged *apud acta*, although the party should delay to prosecute it; any such attempt would trespass on the province of the judge *ad quem*, the judge *à quo* can only proceed to carry his sentence into execution (*c*).

[Form of Instrument of Appeal.]

[In the name of God, Amen. Before you, the notary public approved and allowed by authority, and the witness of good faith and credit here present, I, E. T. the younger, notary public, and one of the procurators general exercent of the Arches Court of Canterbury, do exhibit as proctor, and make myself a party for R. M. L., Esq., one of the parties in a certain cause of appeal and complaint and nullity, which was lately depending in judgment in the said Arches Court of Canterbury, promoted by the said R. M. L. against the Right Honourable Lady J. L., his lawful wife, and which was in the first instance a certain cause of divorce or separation from bed, board and mutual cohabitation, by reason of alleged cruelty, promoted and brought in the Consistorial and Episcopal Court of London, by the said Right Honourable Lady J. L., against the said R. M. L., with a design and intent to appeal from, and complain of, all and singular the nullities, iniquities, grievances and errors, in proceedings hereinafter mentioned, and alike principally complaining of them and every of them; do by this writing say, allege, and in law articulately propound, that in the said cause or business of appeal and complaint of nullity the Right Honourable Sir H. G., Knight, Doctor of Laws, the judge of the said Arches Court of Canterbury, howsoever constituted, unduly and unjustly proceeding (saving all reverence due to him), too much favouring the party of the said Right Honourable Lady J. L. more than by law he ought, and not in the least regarding

(b) [See *Chichester v. Donegal*, 1 Bowles, Arches Court, 1841, 16th Add. 22.] Feb., Bye Day, Hilary Term.]

(c) [See the case of *Bowles v.*

the requisites and forms of law and judicial proceedings, did in fact, though unduly, on the — day of —, in the year —, by his interlocutory decree, having, as pretended, the force and effect of a definitive sentence in writing, pronounce against the said appeal, and that the judge from whom the said cause was appealed had proceeded rightly, justly and lawfully, and did affirm the sentence appealed from, and condemn the said R. M. L. in costs, against right and justice, and without any sufficient and lawful proofs in that behalf, acting in all things null and unjustly, as well by virtue of his pretended office as at the unjust assistance, instigation, solicitation, procurement or petition, of the said Right Honourable Lady J. L., or her proctor, to the very great detriment, prejudice and grievance, of the said R. M. L. Whereupon I, the said E. T. the younger, the proctor aforesaid, looking upon and believing my said client, and myself in his name, to be very much injured and aggrieved by all and singular the nullities, iniquities, injustices, grievances and errors, in proceedings aforementioned and other pretended acts and facts of the said pretended judge, to be collected from the proceedings in the said cause, and justly fearing that my said party may be further injured and aggrieved thereby, do by this writing appeal from them and every of them, and especially from the said judge pronouncing against the said appeal, and that the judge from whom the said cause was appealed had proceeded rightly, justly and lawfully, and affirming the sentence appealed from and condemning the said R. M. L. in costs, without any sufficient or lawful proof in that behalf, and from everything following and arising therefrom, to the most Serene Princess in Christ and our Sovereign Lady Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, and so forth, in her most honourable privy council, and do equally and alike principally complain of all and singular the nullities, iniquities, injustices, injuries, grievances and errors, in proceedings aforementioned. And I do hereby three times severally and most earnestly pray and desire letters dimissory to be made out and delivered to me or my said party effectually. And I do protest that there are not at the most fifteen days fully elapsed since the grievances aforementioned were done to my client, or at least since they came to his knowledge, and that I would willingly have appealed in the presence of the said judge himself, if I could conveniently have so done. And lastly, I do protest and reserve to myself power to correct and reform this my appeal and complaint, by adding thereto or subtracting therefrom, and reducing the same into a better and more competent form, and also to intimate the same to every person to whom by law I ought, as the law shall require, and counsel advise, at time and place convenient, according to law, style and custom, upon all and singular which premises the said E. T. the younger, the procurator aforesaid, desired and required me, the notary public hereunder written, to draw up from thence for him one or more public instrument or instruments, and the witness subscribed to attest the same.

[This appeal was interposed on —, the — day of —, in year of our Lord —, in the office of Messrs. T. and Sons, situate in —, by the said E. T. the younger, the proctor aforesaid, who then and there appealed, protested and prayed letters dimissory, and did all things as in the above written appeal is contained, there being then and there present with me, the said notary

[Practice—Appeal—Form of Petition.]

public, T. B. P., also notary public, especially required and desired to witness the same.

Which I attest, J. W. W., Not. Pub.

[Witness, T. B. P., Not. Pub.]

Judicial Committee of Privy Council.

Time of appealing to.

[The creation of the Court of the Judicial Committee (f) of the Privy Council by 2 & 3 Will. 4, c. 92, and 3 & 4 Will. 4, c. 41, as the Supreme Court of Appeal from all Ecclesiastical Courts, as well as the general law on the subject, is discussed at length under the title *Appeal*, vol. i. p. 57 (g). It may be as well to mention here, that by sect. 20 of 3 & 4 Will. 4, c. 41, it is enacted, "That all appeals to his majesty in council shall be made within such times respectively within which the same may now be made, where such time shall be fixed by any law or usage, and where no such law or usage shall exist, then within such time as shall be ordered by his majesty in council; and that, subject to any right subsisting under any charter or constitution of any colony or plantation, it shall be lawful for his majesty in council to alter any usage as to the time of making appeals, and to make any order respecting the time of appealing to his majesty in council." It may be convenient to the reader to find in this place the form of petition which since the erection of this new tribunal has become a necessary preliminary to the lodgment of an appeal before the Judicial Committee of the Privy Council, and is indeed the step which comes next in order to the assertion of the appeal as given in the foregoing instrument.]

[Form of Petition to the Queen in Council.]

[In the Privy Council.]

From the Prerogative Court of Canterbury.

John Doe, Esquire, Appellant.

Mary Roe, Widow, Respondent.

To the Queen's Most Excellent Majesty in Council.

The humble Petition of Geoffry Styles, Proctor of the above-named John Doe, sheweth:—

That in a certain cause of granting letters of administration of the goods of Richard Roe, deceased, lately brought in the Prerogative Court of Canterbury, by Mary Roe, widow, the relict of the said deceased, against John Doe, the sole executor named in the will of the said deceased, the judge of the said court did by his sentence on the — day of — last, pronounce against the said will, and decreed letters of administration of the goods of the said deceased as dying intestate to be granted to the said Mary Roe, and condemned the said John Doe in costs; from which

(f) [See the title *Prohibition*, in this volume; also *Evidence*, under SPECIAL PART, post; and *Execution of Sentence*, ante, p. 211.]

(g) [As to the appeal to Convocation where the crown is a party to a suit, see title *Appeal*, vol. i. p. 63 b.]

sentence an appeal hath been duly entered on behalf of the said John Doe, and lodged in the Registry of the High Courts of Admiralty and Appeals.

Wherefore your Petitioner most humbly prays that your Majesty will be graciously pleased to refer this petition and the said appeal to the Judicial Committee of the Privy Council.

[11.—*Form of Minutes in a Cause of Appeal before the Judicial Committee of the Privy Council, as taken down in the Assignation Book of the Registrar.*

[C—— against C——.

13th July, 1838.

On this day was received from P. C. M. proctor for J. C. Esquire, the appellant, his petition to the Queen's most excellent Majesty in council, praying that her Majesty would be pleased to refer the above appeal to the judicial committee of the privy council, which petition the deputy registrar transmitted to the clerk of the council in order that the same might be laid before her Majesty.

21st July, 1838.—*The deputy registrar alleged that he had received a letter dated the 18th instant, from one of the clerks of her Majesty's most honourable privy council, signifying that her Majesty had been pleased to refer the above appeal to the judicial committee of the privy council.*

8th Oct. 1838.—*The usual inhibition, citation and monition was decreed at petition of M.*

7th Nov. 1838.—*M. returned inhibition and citation executed, and exhibited a proxy under the hand and seal of J. C. Esquire, and returned monition for process executed.*

F. D. appeared for E. C. (wife of the said J. C. the respondent) and exhibited a proxy under her hand and seal; and prayed a libel. M. brought in the libel. The surrogate assigned to hear an admission thereof next court, and continued the certificate of the execution of the monition to same time.

15th Nov. 1838.—*F., on behalf of the registrar of the court below, brought in the process, and the surrogate at petition of M. admitted the libel, F. D. not opposing the same, and he gave a negative issue thereto. The surrogate assigned the cause for sentence on the first assignation next court.*

23rd Nov. 1838.—*The same assignation was continued.*

1st Dec. 1838.—*The surrogate, at petition of F. D., allotted the same sum per annum for alimony, to be paid to E. C. (wife of J. C. Esquire), his party, the respondent, as was allotted to her in the court below, M. not objecting.*

The surrogate, at petition of both proctors, on motion of counsel assigned the cause for hearing on the second assignation before the judicial committee of the privy council at Whitehall whensoever.

30th June, 1840.

On Tuesday, the 30th day of June, in the year of our Lord 1840,

[Practice—Minutes in a Cause of Appeal.]

before the Judicial Committee of her Majesty's most honourable Privy Council, at the Council Chamber, Whitehall.

Present : Lord Brougham,
Sir James Parke, Knight,
Sir John Bernard Bosanquet, Knight.
The Honourable Thomas Erskine.

In the presence of

H. B. S., Deputy Registrar.

C. against C. }
M. F. D. } For hearing.

M. undertook for the payment of the alimony now due and for costs up to the final hearing of the cause, and prayed that their lordships would be pleased to report in favour of the appeals and complaints of J. C. Esquire, his party, that the decree or sentence of the judge of the Arches Court of Canterbury and the sentence of the judge of the Consistorial and Episcopal Court of London appealed from ought to be reversed, the principal cause retained therein that E. C. (wife of the said J. C.) ought to be pronounced to have failed in proof of the libel, and exhibits given in and admitted in the said Consistorial and Episcopal Court, and that the said J. C. ought to be dismissed from the original citation issued under seal of that court and from all further observance of justice in this cause.

F. D. prayed that their lordships would be pleased to report to her Majesty against the said appeals and complaints, that the sentence of the judge of the Consistorial and Episcopal Court of London and the decree or sentence of the judge of the Arches Court of Canterbury appealed from ought to be affirmed, and the cause remitted to the judge of the Arches Court of Canterbury, from whom the same was appealed.

Their lordships, having read the evidence transmitted from the court below, and heard counsel on behalf of the appellant, assigned the cause for further hearing to-morrow at ten o'clock in the forenoon.

1st July, 1840.—Their lordships, having heard counsel and proctors on both sides, assigned the cause for further hearing on Saturday, the 4th instant, at ten o'clock in the forenoon.

4th July, 1840.—Their lordships having heard counsel further on both sides, took time to deliberate.

14th July, 1840.—Their lordships, having read the evidence transmitted from the court below, and on three former days heard counsel and proctors on both sides, were pleased to agree to report their opinion to her Majesty in favour of the appeal and complaint of the said J. C., the appellant, that the decree or sentence of the judge of the Arches Court of Canterbury, and the sentence of the judge of the Consistorial and Episcopal Court of London, appealed from, ought to be reversed; the principal cause retained therein, that the said E. C. ought to be pronounced to have failed in proof of the libel and exhibits given in and admitted in the said Consistorial and Episcopal Court, and that the said J. C. ought to be dismissed from the original citation issued under seal of that Court, and from all further observance of justice in this cause, the costs and alimony now due to the said E. C. being first paid.

[The Judicial Committee having delivered their judgment in the cause, the next step is to obtain its confirmation by the order of her Majesty in Council.

[Tenor of her Majesty's Order in Council, dated the — of —, confirming the Report of the Judicial Committee to her Majesty in Council, dated the — of —.

C. against C. }
M. F. D. }

At the Court at Buckingham Palace, the — of —.

Present: The Queen's Most Excellent Majesty.

Lord Chancellor,	Lord John Russell,
Lord President,	Viscount Palmerston,
Lord Privy Seal,	Viscount Melbourne,
Marquis of Normanby,	Viscount Duncannon,
Lord Steward,	Lord Holland,
Lord Chamberlain,	Sir John Hobhouse, Bart.,
Earl of Albemarle,	Mr. Chancellor of the Exchequer,
Earl of Minto,	Mr. Macaulay.

Whereas there was this day and at the board a report from the Judicial Committee of the Privy Council, dated the — of —, in the words following, viz.:

Whereas your Majesty was pleased by your order in council of the — of — to refer to this committee the humble petition of P. C. M., proctor for J. C., Esq., the appellant in a certain cause of appeal and complaint from a certain interlocutory decree or sentence given and pronounced on the — day of —, by the judge of the Arches Court of Canterbury, in a certain cause or business of appeal and complaint promoted and brought before him by the said J. C., Esq. from a certain sentence signed, promulged and given by the judge of the Consistorial and Episcopal Court of London, on the — day of —, in a certain cause or business of divorce by reason of cruelty and adultery promoted and brought by E. C., wife of the said J. C., against him the said J. C., Esq. And whereas an appearance was afterwards given before a surrogate of the committee by a proctor on behalf of the said E. C., the respondent in this cause of appeal.

The lords of the committee, in obedience to your Majesty's said order of reference, took the said petition and order of reference into consideration, and having read the evidence transmitted from the court below, and on three former days heard counsel and proctors on both sides, did this day agree humbly to report their opinion to your Majesty in favour of the appeals and complaints of the said J. C., that the decree or sentence of the judge of the Arches Court of Canterbury, and the sentence of the judge of the Consistorial and Episcopal Court of London, appealed from, ought to be reversed; the principal cause retained therein, that the said E. C. ought to be pronounced to have failed in proof of the libel, and exhibits given and admitted in the said Consistorial and Episcopal Court, and that the said J. C. ought to be dismissed from the original citation issued under seal of that court, and from all further observance of justice in this cause, the costs and alimony now due to the said E. C. being first paid.

Her Majesty, having taken the said report into consideration, was pleased, by and with the advice of her privy council, to approve thereof and of what is therein recommended, and to order as it is hereby ordered, that the same be duly and punctually observed, complied with and carried into execution. Whereof all persons whom it may concern are to take notice and govern themselves accordingly.

(Signed)

C. C. Greville.

[12. *Letters of Request.*

[It has been said that the Arches Court may take original cognizance by Letters of Request of all causes which may be brought in a Diocesan Court of the Province. The nature of these remains to be explained. In any case, where a Diocesan Court within the Province has a jurisdiction over the parties, the plaintiff may apply to the judge of such court for letters of request, in order that the cause may be instituted in the Court of Arches; and when the judge of the court below has consented to *sign* such letters, and they have been *accepted* by the judge of the Arches, a *decree* issues under his seal, calling upon the defendant to answer to the plaintiff in the suit instituted against him. The institution of a suit by Letters of Request does not fall under the prohibition of the "Bill of Citations," 23 Hen. 8. (b)

[*Letters of Request from an inferior Judge to the Dean of the Arches, for bringing a Cause of Divorce* (c).

[*Whereas A. B., wife of C. B., of —, in the county of —, and diocese of —, doth intend to commence a suit against the said C. B., her husband, of —, in the county of —, and diocese aforesaid, in a cause of separation or divorce by reason of cruelty and adultery, and to that purpose hath requested me, A. C., Vicar General of the Right Rev. Lord Bishop of —, for that part of the diocese of — which lies within the archdeaconry of —, to grant her letters of request that she may commence the said suit in the Arches Court of Canterbury.*

[*And whereas the commencing the said cause in the Court of Arches will be of advantage to both the parties therein, not only from the better assistance they can there have of advocates and proctors (d) than in the Commissary's Court of —, but as the same will be also a more ready and expeditious way for the hearing and finally determining the said cause: These are therefore, at the desire of the said*

(b) [*Vide infra, Citation, under SPECIAL PART.*]

(c) [On a stamp.]

(d) [The Judge of the Arches, therefore, would probably refuse to accept Letters of Request from the Consistory of London, or the Court of the Dean and Chapter of St. Paul's, or of Westminster, as the reasons

therein alleged would be inapplicable. The Church Discipline Act empowers the bishop in all cases to send the cause by Letters of Request to the superior Court; and where he is patron of the preferment of the accused clerk, compels him to do so. See title *Privileges and Restraints of the Clergy*, in this volume.—ED.]

A. B., to request, and I do hereby request, the right honourable *H. J.* Knight, Official Principal of the Arches Court of Canterbury, lawfully constituted, to call the said *C. B.* to appear before him, or his surrogate, or any other competent judge in this behalf, to answer to the said *A. B.*, his wife, in a cause of separation or divorce by reason of cruelty and adultery, and to hear and finally determine the said cause according to law. In witness, &c. *W.*

[Form of Decree by Letters of Request from the Arches Court of Canterbury for Divorce.]

[*H. J.*, Knight, Doctor of Laws, Official Principal of the Arches Court of Canterbury, lawfully constituted, To all and singular clerks and literate persons whomsoever and wheresoever in and throughout our whole province of Canterbury, greeting. Whereas by virtue of letters of request under the hand and seal of the Worshipful ———, Vicar General of the Right Reverend Father in God, by Divine permission Lord Bishop of ———, and Official Principal of his Consistorial and Episcopal Court ———, presented to and accepted by us, of the tenor and in the words following: “Whereas *L. F.* (wife of *W. F.*) of the parish of ———, in the county of ———, in the diocese of ———, doth intend to commence and prosecute against the said *W. F.* of ———, in the parish of ———, in the county of ———, and diocese of ———, a certain cause or suit of divorce or separation from bed, board, and mutual cohabitation, by reason of adultery by him the said *W. F.* committed; and for that purpose hath requested me, ———, Vicar General of the Right Reverend Father in God ———, by Divine permission Lord Bishop of ———, and Official Principal of his Consistorial and Episcopal Court of ———, to grant to her letters of request, that she may apply for the original citation or decree in the said cause or suit in the Arches Court of Canterbury. And whereas the applying for the said original citation or decree in the Arches Court of Canterbury will, as it is represented unto me, be of advantage to all the parties, not only from the able assistance they can have of counsel in the said Arches Court of Canterbury, but as the same will be also a more ready and expeditious way for the hearing and finally determining the said cause: These are therefore, at the desire of the said *L. F.*, to request, and I do hereby request the Right Honourable Sir *H. J.*, Knight, Doctor of Laws, Official Principal of the said Arches Court of Canterbury, lawfully constituted, to decree a citation or decree to issue under seal of the said Arches Court of Canterbury, at the instance of the said *L. F.*, and thereby to cite the said *W. F.* to appear personally before him or his lawful surrogate, or other competent judge in this behalf, to answer to the said *L. F.* in his aforesaid cause or suit of divorce by reason of adultery, and to hear and determine the said cause according to law. In witness whereof I have hereunto set my hand and seal, this ——— day of ———, in the year of our Lord ———.” We, rightly and duly proceeding at the petition of the proctor of the said *L. F.*, of the parish of ———, in the county of ———, in the diocese of ———, and province of Canterbury, have decreed *W. F.*, the lawful husband of the said *L. F.*, of ———, in the parish of ———, in the county of ———, and diocese of ———, and province of Canterbury, to appear in judgment on the day, at the time and place, and to the effect hereinafter mentioned (justice so requiring). We do there-

fore hereby authorize, empower, and strictly enjoin and command you peremptorily to cite or cause to be cited the said *W. F.*, of the parish, county, diocese, and province aforesaid, to appear before us, our surrogate, or some other competent judge in this behalf, in the common hall of Doctors' Commons, situate in the parish of *St. Benedict*, near *Paul's Wharf*, London, and place of judicature there, on the sixth day after service of these presents, if it be a general session, by-day or additional court day, otherwise on the general session, by-day or additional court day then next following, at the hour of ten in the forenoon, and there to abide, if occasion require, during the sitting of the said court there, then and there to answer to the said *L. F.* in a cause of divorce from bed, board, and mutual cohabitation, by reason of adultery by him committed, and further to do and receive as unto law and justice shall appertain in the premises, under pain of the law and contempt thereof, at the promotion of the said *L. F.*; and what you shall do or cause to be done in the premises, you shall duly certify us, or our surrogate, or some other competent judge in this behalf, together with these presents. Dated at London, this — day of, &c.
— —, Register.

[13. *Orders of Courts at Doctors' Commons, and Act of 10 Geo. 4, c. 53.*

[*Orders made 1st Session of Easter Term, 1827.*

[“ 1. That on the first session of every Hilary, Easter, and Michaelmas Term, publication shall pass on all pleas given in, and admitted, on or before the by-day of the term preceding; unless, upon such first session, cause be shown, to the satisfaction of the court, for extending the term probatory. Provided that nothing herein contained shall preclude the court from assigning a shorter term probatory, or prevent the party, giving the plea, from sooner praying publication.

[“ 2. That a party, intending to counterplead, shall assert his allegation the court-day on which the term probatory expires, and shall bring it in on the following court-day; unless, on that day, cause be shown, to the satisfaction of the court, for allowing further time for bringing in such allegation.

[“ 3. That upon answers being prayed, the proctor praying the answers shall forthwith take out a decree, and shall cause the same to be duly served, without delay, on the adverse party in the cause, so as to put such party in contempt, in case the decree shall not be obeyed within a reasonable time. Provided that the examination of witnesses shall not be delayed, nor the publication be postponed, in order to wait for the answers; but publication shall pass as aforesaid, unless, upon application being made to postpone the publication, it shall appear to the satisfaction of the court, that due diligence had been used in taking out, and enforcing the decree for answers.

[“ 4. That when application is intended to be made for extending the time in any case, notice thereof in writing, and of

the grounds on which the application is to be made, shall be given to the adverse proctor, and delivered into the registry three days before the making of such application.

[“ 5. That any neglect or delay in bringing in answers, or in other proceedings, shall be matter of consideration, in respect to costs, either immediate, or at the end of the cause.

[“ (Signed) J. NICHOLL, Dean.

[“ On the fourth session of Trinity Term, 1827, the judge ordered, that, ‘previous to the commencement of each term, the registrar should deliver to the court a list of all causes in which no proceedings shall have been had during the preceding term.’

[“ On the second session of Easter Term, 1828, the Judge of the Consistory Court of London directed that the above orders issued by the Dean of the Arches, on the first session of Easter Term, 1827, should, from the first session of Trinity Term, 1828, be observed also in the Consistory Court: remarking that they had now been in operation for a year in the Arches and Prerogative Courts, and had been attended with no inconvenience, but, on the contrary, with great benefit to the suitors.”

[The 10 Geo. 4, c. 53 (a) contains in its five first sections enactments relating to the fees of the Ecclesiastical Courts (see title *Fees*, vol. ii. p. 258); by the remaining sections of the act it was enacted as follows:

[Sect. 6. “And whereas various important duties are required to be performed by the deputy registrars and clerks of seats in the office of the Prerogative Court, and by the other officers, clerks, and ministers employed in the registry and in other offices of the several before-mentioned courts, the due performance of which it is expedient to regulate and enforce, and to provide for the due qualification of the persons appointed to such offices: Be it therefore enacted, that it shall and may be lawful for the said persons for the time being respectively hereinbefore authorized to establish fees, and they are hereby required, forthwith to inquire into the performance of such duties, and from time to time to make such regulations respecting the same, and the performance thereof by the several officers, clerks and ministers aforesaid, as to them shall seem expedient; which regulations, having been approved and confirmed by the Lord Archbishop of Canterbury, when they relate to the said Court of Arches, Prerogative Court, and Court of Peculiars, or either of them, and having been approved and confirmed by the Lord Bishop of London, when they relate to the said Consistory Court and Commissary Court, or either of them, shall be entered or enrolled in the public books or records of the courts to which they shall relate respectively, and shall from the time of such entry or enrolment be in full force with respect to such officers, clerks and ministers respectively, and binding upon them and each of them.”

Power to
make Regu-
lations for
due Perform-
ance of
Duties.

(a) [Passed 19th June, 1829.]

Appointment
of Deputy
Registrars,
&c.

[Sect. 7. "That from and after the passing of this act, no person shall be appointed to the office of deputy registrar, entering clerk, record keeper, clerk of the seats, or examiner in any of the said several courts respectively, unless the appointment of such person to such office shall be previously approved by the judges for the time being of the said several courts respectively, and confirmed by the Archbishop of Canterbury or Bishop of London, as such appointment may relate to the respective courts of such archbishop or bishop, such approbation and confirmation to be signified in writing, and to be registered."

As to the Ap-
pointment of
Clerks of
Seats.

[Sect. 8. That no person shall be hereafter appointed clerk of a seat in the office of the said Prerogative Court unless he be a notary public, and have duly served a clerkship of seven years to a proctor practising as such in one of the said courts; and such clerk of a seat shall execute his duties in person, except when prevented by reasonable cause; and when so prevented, he shall procure the assistance of some other notary public, to be approved by the judge; Provided always, that nothing herein contained shall extend or apply to any clerk of a seat in the office of the Prerogative Court, duly appointed thereto before or at the time of passing this act."

Additional
Court Day
may be ap-
pointed, and
Orders made
for expedit-
ing Causes.

[Sect. 9. "And whereas delay in the progress of causes in the said several courts, and in the High Court of Delegates, is occasioned by some of the present rules of practice, and particularly by rules respecting causes proceeding in *pœnam contumaciæ*, where the parties cited do not appear; be it therefore enacted, that it shall and may be lawful for the judges for the time being of the said Court of Arches, Prerogative Court, Court of Peculiars, Consistory Court, and Commissary Court respectively, from time to time to appoint new and additional court days for the transaction of business in their several courts respectively; which new and additional court days shall, from and after the appointment thereof as afore-said, be regular court days for the transaction of business, to all intents and purposes; and to make orders of court for expediting and regulating the proceedings in their several courts, and to cause the said orders to be entered or enrolled in the public books or records of the several courts to which they respectively relate, and which, when so entered, shall, until altered or revoked by the same authority, be observed by such courts respectively; and all such orders for the expediting or regulating the proceedings in any causes, as far as the same are applicable to cases of appeal, shall be submitted to the consideration of the lord high chancellor or keeper of the great seal for the time being, who may direct the same and any further order or orders to be observed as rules of practice by the said High Court of Delegates in all causes to which such rules and orders respectively may relate or be applicable; and which orders, when approved by the lord chancellor or lord keeper for the time being, shall be entered as rules of practice in the register books of the said Court of Delegates, and be observed as such by the same court accordingly, until altered or revoked by competent authority.

Holidays.

[Sect. 10. "And whereas great and unnecessary inconvenience and delay are occasioned by the numerous holidays now kept in the office of the said Prerogative Court; be it therefore enacted,

that from and after the passing of this act no holidays shall be kept in the office of the said Prerogative Court except such as are observed as holidays at his majesty's head office of stamps in London."

[Sect. 11. "And whereas great inconvenience arises from the said Court of Peculiars being held in the vestry room of Bow Church; be it therefore enacted, that from and after the passing of this act, the said Court of Peculiars shall and may be held in the common hall or place of judicature in Doctors Commons; and that all process from and out of the said Court of Peculiars shall be returnable at such place in Doctors Commons; and all the business of the said Court of Peculiars shall be done and transacted in the said place as fully and effectually, to all intents and purposes whatsoever, as if the same had been done and transacted in the said vestry room of Bow church; any usage to the contrary notwithstanding."

Court of Peculiars may be held in Doctors Commons.

[Sect. 12. "And whereas great inconvenience arises from the ceasing of the functions of the judges and other officers, and the suspension of business in the several courts of the lord Archbishop of Canterbury and of the Bishop of London respectively, upon any vacancy of their respective sees; be it therefore enacted, that upon any vacancy of the respective sees of Canterbury and London, after the passing of this act, the judges and officers for the time being of the several courts of the said lord Archbishop of Canterbury and Bishop of London respectively shall during such vacancy, and until the issuing of new commissions in that behalf, respectively continue to hold their respective offices; and all business in the several offices of such courts respectively shall be transacted and carried on during such vacancy, and shall be as valid and effectual, to all intents and purposes, as if no such vacancy had occurred."

Officers shall continue and Business be transacted in the said Courts during the Vacancy of the Sees of Canterbury or London.

[Sect. 13. "That upon the death of any of the judges of the said several courts, the surrogates and other officers of the said several courts appointed by such judges respectively shall continue to exercise their respective offices until a new appointment shall be made by the persons having competent authority so to do."

Upon Death of Judges, the Surrogates, &c. to continue until new Appointments.

[Orders made the 4th Session of Trinity Term, 13th February, 1830 (a).

[" 1. That all court-days appointed as sessions, and by-days, in each term, for the Courts of Arches and Peculiars, and for the Prerogative Court, shall each of them be reciprocally considered, and taken to be, regular court-days for the dispatch of all business in each and every of the said courts, and that so many additional court-days, in and after each and every term, shall be from time to time appointed, as may be deemed and considered necessary for the dispatch of business, and such additional court-days shall be, to all intents and purposes, regular court-days.

[" 2. That all days which shall be appointed as caveat-days in the Prerogative Court, shall be regular court-days for expediting all proceedings in that court, and likewise in the Courts of Arches and Peculiars.

(a) [Founded on 10 Geo. 4, c. 53.]

[“ 3. That when a party shall have been duly cited, and shall not appear on the day assigned for his appearance, such party shall be pronounced in contempt, and the proceedings shall, on the following court-day, and afterwards, be carried on in pain of his contempt,—‘*in pœnam contumaciæ*.’

[“ 4. That where proceedings are carried on ‘*in pœnam contumaciæ*,’ witnesses may be produced and sworn before a surrogate in his chambers, as well as in open court, and such production shall be immediately entered and recorded in the register book; but the witness so produced shall not be repeated to his deposition, until forty-eight hours, at least, shall have expired from the time of his production.

[“ 5. That the proctor of a party taking out a citation, or other process, shall on the day of its return be prepared to exhibit his proxy, and to proceed in the cause by taking the first step therein according to the nature of the proceedings.

[“ 6. That any party who shall have been served with a citation, or other process to appear, and who shall appear on the day assigned therein, shall be dismissed with his costs, unless the party taking out such citation, or process, shall return the same and be prepared to proceed in the suit, for which costs the proctor taking out such citation or other process shall be liable.

[“ 7. That a proctor, appearing for a party cited, shall be prepared with his proxy, and shall exhibit the same on entering such appearance.

[“ 8. That the proctor of a defendant in a matrimonial cause shall admit, or deny, the fact of marriage, under pain of suspension, on the same day that the plea alleging the marriage is admitted.

[“ 9. That if the party giving in any allegation shall require the answers of the adverse party, he shall on the day, on which his plea is admitted, apply to the court to assign a time for bringing in such answers, and unless the answers shall be brought in, at or before the time assigned, the facts pleaded shall be taken *pro confesso*, as against the party so neglecting to give in his answers.

[“ 10. That the expense of taking depositions to prove facts confessed in answers, or admitted in acts of court, if taken after such confessions or admissions, shall be paid by the party producing the witnesses, unless the court shall think fit to direct otherwise.

[“ 11. That in all cases the court may extend the time upon reasonable cause shown.

[“ 12. That when any exhibits are pleaded in supply of proof, the proctor of the adverse party shall, on the day on which the plea is admitted, declare, whether he confesses or denies the handwriting, as pleaded, of such exhibits, and if the handwriting be denied, and afterwards proved, the costs

occasioned by the proof shall be paid by the party who denied the handwriting, unless the court shall think fit to direct otherwise.

[“ 13. That in all cases, the court may, upon application made to it, direct security for costs to be given by either, or all, of the parties.

[“ (Signed) J. NICHOLL,
Official Principal of the Court of Arches.”

[The Judge of the Consistory Court of London having adopted these orders as the regulations of that court, observed in the case of *Turton v. Turton* (d), “ I do not consider that the order in respect to a security for costs, entitles the wife, in a matrimonial suit, as a matter of course, to enforce the regulation: it applies principally to testamentary causes (e): but still may be introduced into cases of another description. The application, in this instance, is not supported by affidavit: I decline to make any order, and I conclude the cause.”

[Orders of 8th May, 1830.

[“ To the deputy registers of the Prerogative Court,

[“ Understanding that some few instances have recently occurred in which *probates or administrations are supposed to have been obtained by fraudulent means*, I desire the deputy registers will call to the attention of the practitioners and officers of the court the extreme importance of the greatest vigilance and caution in the passing of all grants.

[“ The practitioner must perceive the propriety of obtaining reasonable satisfaction that the person applying for the grant is legally entitled to it, and if from the mode in which the party applies, or from the time that has elapsed since the death of the deceased, or from any other circumstances, there is the least reason to suspect that the person applying is not entitled, it is the manifest duty of a proctor to make further inquiry into the matter; and, consequently, if any proctor proceeds in forwarding such business, without reasonable satisfaction that the grant is not fraudulent, he will be held responsible to the court.

[“ In like manner, the clerk of the seat, or his assistant, and every other officer of the court, whose duty it may be to examine the grant before it passes, observing any reason whatever to doubt its correctness, is directed and required in every such case carefully and diligently to make further inquiry, and not to suffer the grant to pass until he has received reasonable satisfaction respecting it.

[“ It is further directed, that in the oath to be taken by an executor or administrator, the time of the death of the party deceased shall be set forth, by stating ‘ that the deceased died on or about the — day of —, in the year —,’ and that

(d) 3 Hagg. 346.

(e) [See SPECIAL PART, Costs.]

the time of the death so stated in the oath shall be inserted in the *jurat*, and also noted in the *margin* of the probate or administration, in legible characters, so as visibly to appear to any person to whom such probate or administration shall be presented for the purpose of being acted upon. Dated this 8th day of May, 1830.

[“ JOHN NICHOLL,
Judge of the Prerogative Court of Canterbury.”]

[Orders of 29th June, 1830.]

[“ Ordered, That commissions to swear executors or administrators issue and be certified in the form annexed, and that all special commissions issue addressed to the rector, &c. the same as in the form annexed. That no original grant of probates of a will with codicils annexed, where the parties are sworn in town, pass the seal unless the codicil be first numbered and signed by the surrogate, administering the oath, and be so certified in the *jurat*, nor of administration with will annexed unless the same, and the codicils thereto (if any), shall have been respectively numbered and signed by the surrogate, and certified as having been produced before him at the time of administering the oath.

[“ That citations, decrees, monitions, and all other instruments citing parties to appear on the third or other day after service be made returnable into court ‘on the third day (as the case may be) after service, if it be a general session, by-day, caveat day, or additional court day of our Prerogative Court, otherwise on the general session, by-day, caveat day, or additional court day of our said court then next ensuing,’ and that the parties so cited be called upon to appear in court personally or by their proctor duly constituted, or if minors lawfully, at the hour of ten in the forenoon, and there to abide if occasion require, during the sitting of the court; and that no assignation be continued to an Arches or additional Prerogative Court day unless specially directed by the judge.

[“ That decrees to see proceedings be made returnable on a court day to be therein specified, and that the parties cited be called upon to appear personally by their proctor duly constituted, or if minors lawfully, on that day, ‘and also on every other court day, then and there to see and hear all and every the judicial acts, matters, and things needful and by law required to be done and expedited in and about the premises, until a definitive sentence in writing shall be read, signed, promulged, and given, or until a final interlocutory decree shall be made and interposed in the said cause or business, if they or either of them shall think fit for their interest so to do.’ And that all further specification of the several steps to be taken in the cause, such as calling upon the parties to see the

will propounded, an allegation given in and admitted, a term assigned to prove, the same witnesses produced, &c. &c. &c. be discontinued, and that the intimation be worded accordingly.

["That no probate or administration be forwarded the same day on which the papers to lead the same are delivered in, nor on the following day, unless such papers be brought in during office hours, and the engrossed copy of the will be left with the clerks of the papers before twelve at noon of the day on which the probate or administration with the will annexed is to pass the seal. That no commission issue the same day on which the warrant or act to lead the same is delivered in, unless the same be brought in before twelve at noon; and that no business be forwarded by the clerk of the papers for signature after half-past three, the office closing at three o'clock: provided, nevertheless, that the sitting registrar may direct any business under very special circumstances to be sooner forwarded.

["That in all matters to be heard on one of the sessions or by-days of the Prerogative Court, notice thereof be given in the registry, and all papers requisite for the hearing thereof and not brought in be delivered in the day preceding the same sessions or by-day of the Arches Court.

["These orders do not apply to commissions or decrees already issued, or to cases where the parties have been sworn in town, but are otherwise to be in force from and after the fourth session of Trinity Term, 1830.

["J. NICHOLL,
Official Principal of the Arches Court of Canterbury."

[Order, 1st Session, 1830, that Commissions to swear Executors shall be in a certain prescribed Form.

["It appearing by the form of commission annexed to certain orders of court bearing date the 29th day of June last past that no power is delegated to commissioners to take affidavits or administer oaths touching inventories, it is ordered, that from and after the 10th day of September, 1830, commissions to swear executors or administrators issue and be certified in the forms annexed, marked A., B. and C.

["JOHN NICHOLL,
1st September, 1830."

A.

[W., by Divine Providence Archbishop of Canterbury, Primate of all England, and Metropolitan. To our well-beloved in Christ, the reverend the rector, vicar, or officiating minister of the parish or chapelry wherein the person or persons to be sworn by virtue of this commission, or either of them, is or are now residing, or in his absence the rector, vicar, or officiating minister of an adjoining parish or chapelry, greeting: Whereas, J. T. late of the parish of —, in the city of —, deceased, having whilst living and at the time of his death goods, chattels or credits in divers dioceses or jurisdictions sufficient to found the jurisdiction of our Prerogative Court of Canterbury, did make his

Form of
Commission
for swearing
Executors
of a Will re-
siding in the
Country.

last will and two codicils hereunto annexed, and did therein name his daughters, M. T. and J. T. spinsters, executrixes, and afterwards died: We do therefore empower you to swear the said executrixes as well of the truth of the said will and codicils as of the faithful performance thereof, and to make a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, and to render a just and true account thereof, and to exhibit the same into the registry of our said Prerogative Court of Canterbury. And we do further empower you to swear the said executrixes to the truth of the annexed affidavit and also to administer such other oaths, and further to do as may be needful in the premises; and that such oaths being administered, you duly transmit to the commissary of our said court, or his surrogate, the said will and codicils, and all your proceedings thereon, subscribed with the proper handwriting of one or more of you, on or before the last day of March next ensuing, together with these presents. Provided, nevertheless, that this commission shall be null and void to all intents and purposes in the law whatsoever, unless so transmitted before the said term. Given at London, the — day of — in the year of our Lord —, and in the — year of our translation.

Extracted by C. D., Proctor, Doctors Commons.

The Form of the Oath to the Executrixes, laying their hands on the Bible or New Testament.

[Your oath is, that the above-named J. T. died on or about the — day of —, in the year —, and that the writings hereunto annexed contain his true last will and testament, and two codicils, as far as you know or believe; that you are the executrixes named in the said will, and that you will truly perform the same by paying first his debts, and then the legacies therein contained, as far as his goods, chattels and credits will thereunto extend, and the law charge you, and that you will make a true and perfect inventory of all the said goods, chattels and credits, and exhibit the same into the registry of the Prerogative Court of Canterbury, at the time assigned you by the said court, and render a just account thereof when lawfully required, and that the contents of the annexed affidavit, to which you have subscribed your names, were and are true.

So help you God.

M. T. of —, in the parish of — in the city of —.

J. T. of —, in the parish of — in the city of —.

[Each testamentary paper to be subscribed by the minister, adding the word "Commissioner."

[N.B. The executrixes are respectively to subscribe the oath, and add their place of residence and parish, in the presence of the commissioner.

Rector's Certificate.

[I, the undersigned, do hereby certify, that this commission was duly executed before me, and that the above-named M. T. spinster, and J. T. spinster, set and subscribed their names to the foregoing oath in my presence, and that I administered to them the said oath, the testamentary papers to which I have set and subscribed my name, being first hereto annexed, this — day of —, in the year —.

(Signed) A. B. rector of —.

[N.B. The minister is to subscribe to this certificate, adding the name of the parish of which he is a minister, and in case of his absence, such absence to be certified by the minister executing this commission.

B.

[*W.*, by Divine Providence Archbishop of Canterbury, Primate of all England, and Metropolitan. To our well-beloved in Christ, the reverend the rector, the vicar, or officiating minister of the parish or chapelry wherein the person or persons to be sworn by virtue of this commission, or either of them, is or are now residing, or in his absence the rector, vicar, or officiating minister of an adjoining parish or chapelry, greeting: Whereas J. T. late of the parish of — in the city of —, deceased, having, whilst living, and at the time of his death, goods, chattels or credits, in divers dioceses or jurisdictions, sufficient to found the jurisdiction of our Prerogative Court of Canterbury, lately died intestate; We do therefore empower you to swear M. A. T. widow, the relict of the said deceased, truly to administer the goods, chattels and credits of the said deceased, and to make a true and perfect inventory, and to render a just and true account thereof, and to exhibit the same into the registry of our said Prerogative Court; and also to take and see the bond hereunto annexed duly executed by the said M. A. T. with sufficient sureties, and we do further empower you to swear the said M. A. T. to the truth of the annexed affidavit; and also to administer such other oaths, and further to do as may be needful in the premises; and that (such oaths being administered, and the said bond executed as aforesaid), you duly transmit to the commissary of our said court, or his surrogate, all the proceedings therein, subscribed with the proper hand or hands of one or more of you, on or before the — day of — next ensuing, together with these presents. Provided, nevertheless, that this commission shall be null and void to all intents and purposes in the law whatsoever, unless so transmitted before the said term. Given at London, the — day of —, in the — year of our translation.

Form of Commission to swear an intended Administratrix of the Effects of a Person dying without leaving a Will.

Extracted by C. D., Proctor, Doctors' Commons.

[Your oath is, that the above-named J. T. died on or about the — day of — in the year —, and made no will, as far as you know or believe; and that you are the lawful widow and relict of the said deceased, and that you will truly administer his goods, chattels and credits, by paying his debts as far as the same will thereto extend, and the law charge you; and that you will make a true and perfect inventory of all the said goods, chattels and credits, and exhibit the same into the registry of the Prerogative Court of Canterbury at the time assigned you by the said court, and render a just account of your administration when lawfully required; and that the contents of the annexed affidavit, to which you have subscribed your name, were and are true. So help you God.

The Form of the Oath to be administered to the Administratrix, laying her hand on the Bible or New Testament.

M. A. T. of — in the parish of — in the city of —.

[The administratrix is to subscribe the oath and to add her place of residence and parish in the presence of the commissioner.

[I, the undersigned, do hereby certify that this commission was duly executed before me, and that the above-named M. A. T. widow, did set and subscribe her name to the foregoing oath in my presence, and that I administered to her the said oath, and that I saw her, together with her sureties, execute the bond annexed, this — day of — in the year —,

Rector's Certificate.

(Signed)

A. B., rector of —,

C.

Form of
Commission
to swear an
Administrator
where there
is a Will but
no Executor
appointed.

[*W.*, by Divine Providence Archbishop of Canterbury, Primate of all England, and Metropolitan. To our well-beloved in Christ, the reverend the rector, vicar, or officiating minister of the parish or chapelry wherein the person or persons to be sworn by virtue of this commission, or either of them, is or are now residing, or in his absence, the rector, vicar, or officiating minister of an adjoining parish or chapelry, greeting: Whereas, J. T. late of the parish of — in the city of —, deceased, having, whilst living, and at the time of his death, goods, chattels, or credits, in divers dioceses or jurisdictions, sufficient to found the jurisdiction of our Prerogative Court of Canterbury, did make his last will and two codicils hereunto annexed, and did not therein name any executor; We do therefore empower you to swear T. T., the residuary legatee named in the said will, as well to the truth of the said will and codicils, as well and faithfully to administer the goods, chattels and credits of the said J. T. according to the tenor of the said will and codicils, and to make a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased, and to render a just and faithful account thereof, and to exhibit the same into the registry of our said Prerogative Court, and also to take and see the bond hereunto annexed duly executed by the said T. T., the administrator, with sufficient sureties. And we do further empower you to swear the said T. T. to the truth of the annexed affidavit, and also to administer such other oaths, and further to do as may be needful in the premises, and that such oaths being administered, and the said bond executed as aforesaid, you duly transmit to the said commissary of our said court or his surrogate, the said bond and will and codicils and the whole proceedings thereon, subscribed with the proper hand or hands of one or more of you, on or before the — day of — next ensuing, together with these presents. Provided, nevertheless, that this commission shall be null and void to all intents and purposes in the law whatsoever, unless so transmitted before the said term. Given at London, the — day of — in the year —, and in the — year of our translation.

Extracted by C. D., Proctor, Doctors' Commons.

The Form of
the Oath to
the Adminis-
trator, laying
his hand on
the Bible or
New Tes-
tament.

[Your oath is, that the above-named J. T. died on or about the — day of — in the year —, and that the writings hereunto annexed contain his true last will and testament and two codicils, as far as you know or believe; that you are the residuary legatee named in the said will, and that you will well and truly administer the goods, chattels and credits of the said deceased according to the tenor of the said will, that is to say, will first pay his debts, and then the legacies contained in the said will as far as his goods, chattels and credits will thereto extend and the law charge you, and that you will make a true and perfect inventory of all the said goods, chattels and credits, and exhibit the same into the registry of the Prerogative Court of Canterbury at the time assigned you by the said court, and render a just account thereof when lawfully required, and that the contents of the annexed affidavit to which you have subscribed your names were and are true. So help you God.

T. T. of — in the parish of — in the city of —.

[The administrator to subscribe the oath, and to add his place of residence and parish in the presence of the commissioner.

[Each testamentary paper to be subscribed by the minister, adding the word "commissioner."

[I, the undersigned, do hereby certify that this commission was duly executed before me, and that the above-named T. T. set and subscribed his name to the foregoing oath in my presence, and that I administered to him the said oath, the testamentary papers to which I have set and subscribed my name being first hereto annexed, and I also certify that I saw him, together with his sureties, execute the bond annexed, this — day of — in the year —.] Rector's Certificate.

A. B. rector of —.

[The minister to subscribe this certificate, adding the name of the parish of which he is minister, and in case of his absence, such absence to be certified by the minister executing this commission.]

[Order of the 14th February, 1832, of the Dean of the Arches, directing that the first day of each Term in that Court should be the same Day on which such Term commences at Common Law.]

[“Whereas the commencement of the law terms in his Majesty’s Courts at Westminster has been altered by the act 1 Will. 4, c. 70, and whereas it will be convenient to the public that the business of the Courts at Doctors’ Commons should continue as heretofore to commence at or about the same time that it commences in the Courts of Common Law ;

[“I, the undersigned, official principal of the Court of Arches, having taken the premises into consideration, and having conferred thereon with the judge of the High Court of Admiralty, the chancellor of the diocese of London, and others, do hereby order and direct that in future the first day of each term in the Court of Arches shall be the day on which such term commences in the Courts of Common Law, and that the subsequent Sessions and Court Days in each term shall be appointed in the same manner as they are at present appointed.]

“(Signed)

JOHN NICHOLL,

14th February, 1832.”

[14.—Orders of Judicial Committee of the Privy Council.]

[Orders in Council, with respect to the Conduct of Appeals from the Ecclesiastical Courts, &c. &c.]

[At the Court at St. James’s,
the — day of—.]

Present:

The King’s Most Excellent Majesty in Council.

[Whereas in and by a certain act of parliament passed in the 2nd and 3rd years of our reign, intituled, “An Act for transferring the powers of the High Court of Delegates both

“ in Ecclesiastical and Maritime Causes,” it is amongst other things enacted, “ That from and after the 1st day of February, 1833, it shall be lawful to and for every person who might theretofore, by virtue of either of the acts in the said act recited, and thereby repealed, have appealed to his majesty, in his High Court of Chancery, to appeal or make suit to the king’s majesty, his heirs and successors, in council, within such times, and in such manner, and subject to such rules, orders and regulations for the due and more convenient proceeding as shall seem meet and necessary, and upon such security, if any, as his majesty, his heirs and successors, shall from time to time by order in council direct.”

[And whereas we have deemed it expedient forthwith to make certain rules, orders and regulations, for the more convenient proceeding in, and expediting the hearing of, such appeals, we are pleased to order and direct, and we do hereby, by and with the advice of our privy council, order and direct that it shall and may be lawful for any three or more of the lords of our privy council to nominate and appoint such of the advocates of the Arches Court of Canterbury and of our High Court of Admiralty as now are, or hereafter shall be, duly and lawfully admitted surrogates of such courts respectively, to be surrogates of our privy council for and in respect of such appeals, and that it shall and may be lawful for any one of such surrogates, who shall be so nominated and appointed, in all such appeals as shall be brought before us in council, by virtue of the aforesaid act, to decree all such inhibitions, citations and monitions, and to do and perform all such acts as have heretofore been done and performed by the surrogates of the said Arches Court of Canterbury, or of our High Court of Admiralty, in cases of appeal heretofore prosecuted in the said Arches Court of Canterbury and in our High Court of Admiralty respectively.

[And we are further pleased to order and direct that no such inhibition shall issue or be decreed, unless an appeal from the sentence of the court to be inhibited shall have been alleged within fourteen days from the day of such sentence, nor unless such inhibition shall be applied for and extracted within one calendar month from the day upon which such appeal shall have been alleged, and that no such inhibition, citation or monition, shall be decreed, nor any judicial act done by such surrogates, or either of them, unless in the presence of some notary public duly admitted as such, and who shall duly attest such act or decree.

[And we are further pleased to order and direct, that the above rules, orders and regulations shall continue and be in force until our further will and pleasure shall be signified in respect thereto.

[C. Greville.

[At the Council Chamber at Whitehall (a),
the —— day of ——.

Present:

Lord Chancellor | Lord President | Viscount Melbourne.

[Whereas his majesty was pleased by his order in council of the 4th of this instant February, to order and direct that it shall and may be lawful for any three or more of the lords of his privy council to nominate and appoint such of the advocates of the Arches Court of Canterbury, and of his majesty's High Court of Admiralty, as now or hereafter shall be duly and lawfully surrogates of such courts respectively, to be surrogates of his privy council, for and in respect of such appeals allowed to be brought before his majesty in council, by virtue of an act of the 2nd and 3rd year of his present majesty's reign, cap. 92. His lords present, in pursuance of the authority in them vested by the said order, are pleased to nominate and appoint, and do hereby nominate and appoint, the several doctors of civil law now practising, or who shall hereafter be admitted to practise, in the courts of Doctors' Commons, to be surrogates of his majesty's privy council, for and in respect of the said appeals, and for the purposes mentioned in the said order in council of the 4th of February instant.

[C. Greville.

[At the Court at Brighton,
the —— day of ——.

Present:

The King's Most Excellent Majesty in Council.

[Whereas his majesty was pleased by his order in council on the 4th day of February last, to make certain rules and regulations for the more convenient proceeding in, and expediting the hearing of certain appeals to be made to his majesty in council, by virtue of a certain act of parliament passed in the 2nd and 3rd years of his majesty's reign, intituled, "An Act for transferring the Powers of the High Court of Delegates, both in Ecclesiastical and Maritime Causes, to his Majesty in Council." And whereas an order was made at the council chamber at Whitehall, bearing date the 5th day of February last, by the lord chancellor, the lord president of the council, and Viscount Melbourne, in pursuance of, and in part reciting, such order. And whereas since the making of such aforesaid order in council, and the said order of the 5th of February last, a certain other act was passed in the session of

(a) [It will be seen that this order, save and except as to any matter or thing that may have been done in virtue thereof, has been revoked by the next order; but it has been inserted here for the purpose of making the numbers of orders complete, and of avoiding a possible confusion in reference to them.]

parliament of the 3rd and 4th years of his majesty's reign, intituled, "An Act for the better Administration of Justice in "his Majesty's Privy Council." And whereas his majesty has thought it expedient to revoke the said order in council, and the rules and regulations thereby made, and to make other rules and regulations instead thereof, and also to revoke the said order of the 5th of February last. His majesty is pleased, by and with the advice of his privy council, to order and direct, and it is hereby ordered and directed, that the said order in council, and all such rules and regulations as were made thereby, and also the said order of the 5th day of February last, shall, from and after the 9th day of December, be revoked, save and except as to any matter and thing which may have been done in virtue thereof before the date of this order.

[C. Greville.

[At the Court at Brighton,
the —— day of ——.

The King's Most Excellent Majesty in Council.

[Whereas by letters patent under the great seal of Great Britain, certain persons, members of his majesty's privy council, together with others being judges and barons of his majesty's courts of record at Westminster, have been from time to time appointed to be his majesty's commissioners for receiving, hearing, and determining appeals from his majesty's courts of admiralty in causes of prize: and whereas, in and by a certain act passed in a session of parliament of the second and third years of his majesty's reign, intituled "An Act for transferring "the Powers of the High Court of Delegates, both in Ecclesiastical and Maritime Causes, to his Majesty in Council," it is amongst other things enacted, "That from and after the "1st day of February 1833, it shall be lawful for every person "who might heretofore, by virtue of either of the acts in the "said acts recited and thereby repealed, have appealed or "made suit to his majesty in his High Court of Chancery, to "appeal or make suit to the king's majesty, his heirs or successors in council, within such time, in such manner, and "subject to such rules, orders and regulations for the due "and convenient proceeding as shall seem meet and necessary:" and whereas by a certain other act passed in a session of parliament of the third and fourth years of his majesty's reign, intituled "An Act for the better Administration of Justice "in his Majesty's Privy Council," it is amongst other things enacted, "that certain persons, being members of his majesty's "privy council, and who shall from time to time hold or shall "have held certain offices therein mentioned, shall form a "committee of his majesty's privy council, and shall be styled "The Judicial Committee of the Privy Council:" and whereas it is in the said act further enacted, "that from and after

“ the 1st day of June 1833, all appeals or applications in
“ prize suits, and in all other suits and proceedings in the
“ courts of admiralty or vice-admiralty courts, or any other
“ courts in the plantations in America, or other his majesty’s
“ dominions, or elsewhere abroad, which may now by virtue
“ of any law, statute, commission or usage be made to the
“ High Court of Admiralty in England, or to the lords com-
“ missioners in prize cases, shall be made to his majesty in
“ council, and not to the High Court of Admiralty in England,
“ or to such commissioners as aforesaid, and that such appeals
“ shall be made in the same manner and form and within such
“ time wherein such appeals might, if this act had not been
“ passed, have been made to the said High Court of Admiralty,
“ or to the lords commissioners in prize cases respectively;
“ and that all laws or statutes now in force with respect to any
“ such appeals or applications shall apply to any appeals to be
“ made in pursuance of this act to his majesty in council:”
and whereas it is in the said act further enacted, “ that all ap-
“ peals, or complaints in the nature of appeals whatsoever,
“ which, either by virtue of this act, or of any law, statute, or
“ custom, may be brought before his majesty, or his majesty
“ in council, from or in respect of the determination, sentence,
“ rule or order of any court, judge, or judicial officer, and all
“ such appeals as are now pending and unheard, shall, from
“ and after the passing of this act, be referred by his majesty
“ to the said judicial committee of his privy council, and that
“ such appeals, causes and matters shall be heard by the said
“ judicial committee, and a report or recommendation thereon
“ shall be made to his majesty in council, for his decision
“ thereon as heretofore, in the same manner and form as has
“ been heretofore the custom with respect to matters referred
“ by his majesty to the whole of his privy council, or a com-
“ mittee thereof (the nature of such report or recommendation
“ being always stated in open court):” and whereas it is
deemed expedient that certain rules and regulations should be
made for the more convenient conducting of appeals and appli-
cations in prize suits, and in all other suits or proceedings in
the said courts of admiralty, or vice-admiralty courts, or any
other court in the plantations in America, and other his ma-
jesty’s dominions, or elsewhere abroad, which might formerly
by virtue of any law, statute, commission or usage have been
made to the High Court of Admiralty in England, or to the
lords commissioners in prize cases respectively, as well as of
such appeals, suits or complaints in the nature of appeals from
or in respect of the determination, sentence, rule or order of
any judge or judicial officer of any ecclesiastical court in
England, or of the said High Court of Admiralty in England,
which, by virtue of the said recited acts, or either of them, or
by virtue of any law, statute or custom, shall be made to his

majesty in council, or shall have been so made and are now pending and unheard.

[His majesty is pleased, by and with the advice of his privy council, to order and direct, and it is hereby ordered and directed, that all such appeals, applications, suits or complaints in the nature of appeals, as aforesaid, shall be conducted in the same manner and form, and by the same persons and officers as the same might have been conducted, if such appeals, applications, suits or complaints in the nature of appeals had been made, as heretofore, to the said High Court of Admiralty, the said High Court of Delegates, or the lords commissioners in prize cases respectively.

[And it is further ordered and directed, that it shall and may be lawful for any four or more of the members of the said judicial committee of his majesty's privy council, to appoint such of the advocates of the Arches Court of Canterbury, and of the said High Court of Admiralty, (as now are or hereafter shall be duly and lawfully admitted surrogates of such courts respectively,) to be surrogates of the said judicial committee of his majesty's privy council, and that it shall and may be lawful for such surrogates, or any one or more of them who shall be so appointed as aforesaid, in all such appeals, applications, suits or complaints in the nature of appeals as aforesaid, to administer such oaths or affirmations, and to do and perform all such other acts, matters and things, and to make all such orders for the forwarding the said appeals, applications, suits or complaints in the nature of appeals, in their several stages, preparatory to the final hearing thereof by the said judicial committee, as shall be found necessary, or have heretofore been done and performed or made by the surrogates of the said Arches Court of Canterbury, and of the said High Court of Admiralty, in cases of appeals, applications, suits or complaints in the nature of appeals, made and prosecuted to such courts respectively, or by the surrogates of the said lords commissioners in prize cases, in appeals, applications, suits or complaints in the nature of appeals made and prosecuted before the said lords commissioners.

[And it is further ordered and directed, that the present registrar (*a*) of the said High Court of Admiralty, by himself or deputy, and the registrar or registrars of the said court for the time being, shall attend the hearing by the said judicial committee of all appeals, applications, suits or complaints in the nature of appeals, which, but for the said recited acts, would have been heard by any court or commission which such present registrar was entitled to attend in person or by deputy, by virtue of his offices of registrar of the high courts of admiralty, delegates, and appeals for prizes, and to transact, perform and do all acts, matters and things that shall be found

(*a*) [See 2 & 3 Will. 4, c. 21, s. 29.]

necessary, or have heretofore been done by the said registrar or his deputies, in respect of such appeals, applications, suits or complaints in the nature of appeals.

[And it is further ordered, that upon any appeal, application, suit or complaint in the nature of appeal, as aforesaid, being entered in the registry of the High Court of Admiralty and Appeals, a petition by or on behalf of the appellants shall forthwith be presented to his majesty in council, praying that the said petition and appeal may be referred to the judicial committee of the privy council, to hear the same, and report their opinion thereupon to his majesty in council, and upon such reference having been made, notice thereof shall be forthwith transmitted to the registry aforesaid.

[C. Greville.]

[At the Council Chamber, Whitehall,
the —— day ——.

Present:

Lord Chancellor
Lord President

| Sir John Nicholl
| Vice-Chancellor.

[Whereas his majesty was pleased, by his order in council of the 9th of this instant December, to order and direct, that it shall and may be lawful for any four or more of the members of the judicial committee of his majesty's privy council to appoint such of the advocates of the Arches Court of Canterbury, and of the High Court of Admiralty in England, as now are, or hereafter shall be duly and legally admitted surrogates of such courts respectively, to be surrogates of the said judicial committee of his majesty's privy council, for and in respect of certain appeals, suits, applications or complaints in the nature of appeals, in the said order more particularly described, the said lords present, being members of the judicial committee of his majesty's privy council, in pursuance of the authority to them given in the said order in council, are pleased to appoint the several advocates of the said Arches Court of Canterbury, and of the said High Court of Admiralty, who now are or hereafter shall be duly and legally admitted surrogates of the said courts respectively, to be surrogates of the said judicial committee of his majesty's privy council, for and in respect of such appeals, applications, suits or complaints in the nature of appeals as aforesaid, and for the purposes mentioned in the said order.

[C. Greville.]

it should seem, without being liable to costs (*g*). But after an appeal confirming the sentence of the court below, the court has refused to allow proceedings to be stayed by the insertion of a caveat from a widow, who prayed for an answer to her interests, but who had been cognizant of, though not cited, to see the proceedings (*h*).

If a rate-payer be dissatisfied with his assessment, one of his remedies is to enter a caveat against its confirmation by the ordinary (*i*).

[Form of a Caveat in the Prerogative Court.

[Let nothing be done in the goods of *A. B.*, late of —, in the parish of —, in the county of —, deceased, unknown to *E. F.*, proctor for *John Thomas* (usually a fictitious name), having interest.

[Form of a Caveat against a Church Rate.

[Let no rate be confirmed in the parish of — unknown to —, proctor for *John Thomas*.]

2. Citation.

1. Nature and Form of	245	4. Act of 23 Hen. 8, as to citing out of the Diocese	249
2. Errors in, when Fatal, when not	246	5. Return of Citation	258
3. Service of	247	6. Forms	259

1. NATURE AND FORM OF.]—A Citation is a judicial act, whereby the defendant, by authority of the judge (the plaintiff requesting it), is commanded to appear, in order to enter into suit, at a certain day, in a place where justice is administered (*j*). Citation, what.

The Citation ought to contain—1. The name of the judge, and his commission, if he be delegated; if he is an ordinary judge, then the style of the court where he is judge. 2. The name of him who is to be cited. 3. An appointed day and place where he must appear; which day ought either to be expressed particularly to be such a day of the week or month, or else only the next court day (or longer) from the date of the citation: and the time of appearance ought to be more or less, according to the distance of the place where they live. 4. The cause for which the suit is to be commenced (*k*). 5. The name of the party at whose instance the citation is obtained (*l*). [6. And also the residence and diocese of defendant, to show that he is not cited out of his diocese. *Vide post*, 23 Hen. 8.] Its Contents.

(*g*) [*Antrobus v. Leggatt*, 3 Hagg. 616.]

(*h*) [*Dew v. Clark*, 1 Hagg. 311.]

(*i*) [*Watney v. Lambert*, 4 Hagg. 87.]

(*j*) Conset. 26.

(*k*) [But in a criminal suit for incest, a marriage may be annulled, although the citation contained no evidence to that effect. *Chick v. Ramsdale*, 1 Curteis, 34.—ED.]

(*l*) Conset. 26.

Process of
*Quorum no-
mina* forbid-
den.

2. ERRORS IN, WHEN FATAL, WHEN NOT.]—By Can. 120, “No bishop, chancellor, archdeacon, official, or other ecclesiastical judge, shall suffer any general processes of *quorum nomina* to be sent out of his court, except the names of all such as thereby are to be cited shall be first expressly entered by the hand of the register or his deputy under the said processes, and the said processes and names be first subscribed by the judge or his deputy, and his seal thereto affixed.”

The rule of the ancient canon law in which case was, that by the general clause *quidam alii* in citations, not more than three or four persons should be drawn into judgment; whose names (*quorum nomina*) the person who obtained the citation was particularly to express, that there might be no room for fraud, in varying the names at pleasure (*m*).

Citation to a
Company.

A company in London refusing to pay a church rate set upon their hall, the master and wardens were cited into the Ecclesiastical Court by their surnames and names of baptism, with the addition of master and wardens of the company of wax chandlers. And upon moving for a prohibition, because they were cited in their natural capacity, when it should have been in their politic capacity, the court held the citation to be good, because the body politic could not be cited, and there was no remedy but in this way: and a prohibition was denied (*n*). [See 5, 6, 7, of Orders of Court, *supra*.]

Misnomer of
Party.

[The citation of a party by erroneous christian name, a simple misnomer or false addition, where there is no doubt as to the identity of the party, has been holden to be sufficient (*o*). An objection of this kind urged as a plea in abatement must be taken before issue, for, by giving issue, the party allows himself to be the party designed (*p*); and whoever alleges a misnomer is bound to assign the true name by which he means to abide, and against which he is not at liberty to aver (*q*); but a new citation must be taken out. Where the general law is to be relied upon, it is not necessary that it should be specifically stated in the citation (*r*); and as to variance between the articles and citation where the charge is substantially the same, and only a part of the charge is taken away, it will not be fatal. A citation has been held sufficient, where it only called upon the party to bring in an administration, and to show cause why another should not be granted, and did not say to show cause why the original administration should not be revoked (*s*); but it has been holden void where it was taken out upon false

(*m*) *Gibs.* 1009.

(*n*) *H.*, 33 & 34 *Car.* 2; *Skin.* 27.
[See Dr. Lawrence's opinion, *Church
Rate*, vol. i. on the citing of a corpo-
rate body.—*Ed.*]

(*o*) [*Powell v. Burgh*, 2 *Lee*, 517;
Barham v. Barham, 1 *Consist.* 7;
Griffiths v. Reed, &c., 1 *Hagg.* 196.]

(*p*) [*Williams v. Bott*, 1 *Consist.* 3;
Powell v. Burgh, 2 *Lee*, 518.]

(*q*) [*Pritchard v. Dalby*, 1 *Consist.*
187.]

(*r*) [*Hutchins v. Denziloe*, 1 *Con-*
sist. 172.]

(*s*) [*Reece v. Strafford*, 1 *Hagg.*
347.]

pretences, and not served on the party against whom it had been entered (*t*). In a matrimonial suit it has been held, that a citation issuing as “in a suit of nullity of marriage by reason of a former marriage,” will not found a sentence of separation “by reason of an undue publication of banns,” the woman being therein described as spinster; the first husband having died subsequently to the publication of banns, but prior to the marriage (*u*). A wrong description of the judge either by his name or title is fatal to the citation, and to all proceedings founded on it, especially in criminal suits. And an error of this kind in a copy delivered to the proctor of the defendant has been held to entitle the latter to be dismissed from the suit (*v*).

Misnomer of Judge.

[In criminal suits the permission of the judge must be obtained to promote his office (*x*), and the party promoting must give bond with sureties to the judges as a security for costs.—ED.]

3. SERVICE OF.]—“Forasmuch as we are given to understand, that they who have obtained letters citatory do send them by three vile messengers to the place where the person to be cited is said to inhabit; which letters two of them do put up over the altar of the church of that place, or in some other place there, and the third presently take them away; from whence it cometh to pass, that two of them afterwards giving their testimony that they cited him according to the manner and custom of the country, he is excommunicated or suspended as contumacious, whereas indeed he was not contumacious, nor knew any thing of the citation: Therefore to take away this most abominable abuse, and other such like, we do ordain, that from henceforth letters citatory in causes ecclesiastical shall not be sent by those who obtain them, nor by their messengers; but the judge shall send them by his own faithful messenger, at the moderate expense of the person suing them out; or at least the citation should be directed to the dean of the deanry [that is, to the rural dean] where the party to be cited dwelleth, who at the judge’s commandment shall faithfully execute the same by himself or his certain and trusty messengers (*y*).”

By whom to be executed, according to the old Law.

“We do decree, that when the judge sendeth a citation against any person who is absent, he shall commit the execution thereof to the dean of the place, or to some person certain (*z*).”

“Whereas bishops and archdeacons, their officials and other ordinaries, and their commissaries, command primary citations for the correction of offenders to be executed by rectors, vicars,

(*t*) [*Murphy v. Macarthy*, 2 Lee, 529.]

(*u*) [*Wright v. Ellwood*, 2 Hagg. 598.]

(*v*) [*Williams v. Bott*, 1 Const. 1.]

(*x*) [*Maidman v. Malpas*, 1 Consist. 209.]

(*y*) Otho, Athon, 63.

(*z*) Otho, Athon, 123.

By whom to
be executed,
according to
the old Law.

or parish priests; and it is frequently laid to their charge, that concerning those matters for which the citation is made they perversely disclose the confessions of the parties cited made privately unto them, whereby they are greatly scandalized, and the parishioners for the future refuse to confess their sins unto them: we do ordain, that primary citations from the said ordinaries shall not be served by the rectors or others aforesaid, but by the officials, deans, apparitors, or other ministers of the said ordinaries. And if any such primary citations shall be committed to the rectors, vicars, or priests, they shall not be bound to obey them, but the same and all subsequent censures and processes thereupon shall be utterly void and of no effect (a).” [The modern officer of the court is usually called the apparitor (b). See title *Apparitor*, vol. i.—ED.]

In what
manner to be
executed.

By the aforesaid constitution of Otho, the person to whom the citation is directed shall diligently seek the party to be cited.

And when he hath found him, he is to show to the party cited the citation under seal, and by virtue thereof cite him to appear at the time and place appointed: And it is usual also to leave a note with him, expressing the contents thereof (c).

But if it be returned upon the citation that the defendant cannot be found, then the plaintiff's proctor petitioneth, that the defendant may be cited personally (if he can) to appear and answer the contents of the former citation; and if not personally, then by any other ways and means, so as the party to be cited may come to the knowledge thereof; and this is that which is called a citation *viis et modis*, or a public citation, seeing it is executed either by public edict, a copy thereof being affixed to the doors of the house where the defendant dwells; or the doors of the parish church where he inhabits, for the space of half an hour in the time of divine service; or by publication in the church in time of divine service; or, as it hath been said, by the tolling of a bell, or the sounding of a trumpet, or the erecting of a banner. This being done, a certificate must be made of the premises, and the citation brought into court; and if the party cited appear not, the plaintiff's proctor accuseth his contumacy (he being first three times called by the crier of the court), and in penalty of such his contumacy requesteth that he may be excommunicate (d).

But the citation must be served at the door or outside of a man's house; for the house may not be entered in such case without his consent (e).

To this purpose, by the aforesaid constitution of Otho, it is

(a) Stratford, Lind. 90.

(b) [Or “mandatory,” as it is called by Oughton, *vide supra*, “*Mode of conducting a Suit*.”—ED.]

(c) 1 Ought. 44, 45.

(d) Conset. 34; 1 Ought. 49.

(e) Lind. 87; Athon, 63.

directed, that if the person to whom the citation is committed shall not be able to find the party, he shall cause the letters to be publicly read and expounded, on the Lord's day, or other solemn day, in the church of that place where he hath usually dwelt, during the celebration of the mass.

Or publicly in the street (saith Athon) (*f*), if he be hindered from entering the church: otherwise he shall read the citation in the church, and leave a copy thereof upon the altar: and the absent person, by other ways, means, and cautions (if any occur) shall be cited, before he be proceeded against as contumacious.

In like manner, by a constitution of Archbishop Mepham, in certain cases they who cannot be personally cited, shall be cited at their house, if they have any at which they can be safely cited; if they cannot be safely cited at their house, then in the parish church where such house standeth; or if they have no house, then in the cathedral church of the diocese, and also in the church of the parish where the offence was committed (if it can be safely done). And in such cases, they shall be proceeded against in the same manner, as if they had been cited personally (*g*).

[There is some difference between this service and personal service. A personal service may conclude both the party and the court; but a service *viis et modis* is a constructive service, and concludes the party, but does not conclude the court. The court on good and sufficient grounds may open the proceedings to get at the substantial justice of the case (*h*). It is laid down in the books, says Sir William Wynne, and is not to be denied, that parties may be put in contempt by a public citation only (*i*). As to who may object to a citation, see "*Intervener*." See above, Orders of 29th June, 1830, p. 232.—ED.]

Distinction
between a
Citation and
a Personal
Service.

4. ACT OF 23 HEN. 8, AS TO CITING OUT OF THE DIOCESE.] —By the constitution of Archbishop Mepham before mentioned, it is ordained, that all ordinary judges of the province do readily assist one another in making citations and executions, and in executing all lawful mandates.

Citing out of
the Diocese.

Yet by the ancient laws of the church, the metropolitan was forbidden to exercise judicial authority in the diocese of a comprovincial bishop, unless in case of appeal or vacancy. And therefore when Archbishop Peccham excommunicated the Bishop of Hereford for resisting this concurrent power, and affirming against the archbishop that he could not exercise any jurisdiction exclusive of the bishop within the bishop's own diocese, nor take cognizance of causes there *per querelam*; the archbishop defended his claim, not upon the common right of a metropolitan, but upon the peculiar privilege of the Church

(*f*) Athon, 65.

(*g*) Lind. 85.

(*h*) [*Herbert v. Herbert*, 2 Consist.

263, in the goods of *Thomas Robinson*, 3 Phill. 511.]

(*i*) [1 Phill. 176.]

of Canterbury, that the Church of Canterbury enjoyeth such a privilege, that the archbishop for the time being may and ought to hear causes arising within the dioceses of his suffragans, and that in the first instance. Which privilege probably sprung from the Archbishops of Canterbury being *legati nati* to the pope (*k*).

23 Hen. 8,
Statute of Ci-
tations.

But now, by the statute of the 23 Hen. 8, c. 9, s. 1, 2, 3, intituled, The Bill of Citations; "Where great numbers of the king's subjects, as well men, wives, servants, as other the king's subjects, dwelling in divers dioceses of this realm of England and Wales, have been at many times called by citations and other processes compulsory, to appear in the Arches, Audience, and other high courts of the archbishops of this realm, far from and out of the diocese where they dwell; and many times to answer to surmised and feigned causes, and suits of defamation, withholding of tithes, and such other like causes and matters, which have been sued more for malice and for vexation than for any just cause of suit; and where certificate hath been made by the summoner, apparator, or any such light literate person, that the party against whom any such citation hath been awarded, hath been cited or summoned, and thereupon the same party so certified to be cited or summoned hath not appeared according to the certificate, the same party therefore hath been excommunicated, or at the least suspended from all divine services; and thereupon before that he or she could be absolved, hath been compelled, not only to pay the fees of the court whereunto he or she was so called by citation or other process, amounting to the sum of 2s. or 20d. at the least; but also to pay to the summoner, apparator, or other light literate person by whom he or she was so certified to be summoned, for every mile being distant from the place where he or she then dwelled, unto the same court whereunto he or she was so cited or summoned to appear, 2d.; to the great charge and impoverishment of the king's subjects, and to the great occasion of misbehaviour and misliving of wives, women and servants, and to the great impairment and diminution of their good names and honesties: it is therefore enacted, that no manner of person shall be from henceforth cited or summoned, or otherwise called to appear, by himself or by any procurator, before any ordinary, archdeacon, commissary, official, or any other judge spiritual, out of the diocese or peculiar jurisdiction where he shall be inhabiting at the time of awarding or going forth of the same citation or summons (except it shall be for any of the causes hereafter written, that is to say, (1) for any spiritual offence or cause committed or omitted by the bishop, archdeacon, commissary, official, or other person having spiritual jurisdiction, or being a spiritual judge, or by

(*k*) Gibs. 1004.

any other person within the diocese or other jurisdiction whereunto he shall be cited, or otherwise lawfully called to appear and answer; and (2) except also it shall be upon matter or cause of appeal, or for other lawful cause, wherein any party shall find himself grieved or wronged, by the ordinary or judge of the diocese or jurisdiction, or by any of his substitutes, officers or ministers, after the matter or cause there first commenced and begun to be shewed unto the archbishop or bishop, or any other having peculiar jurisdiction, within whose province the diocese or place peculiar is; or (3) in case that the bishop or other immediate judge or ordinary dare not nor will not convent the party to be sued before him; or (4) in case that the bishop of the diocese or judge of the place, within whose jurisdiction or before whom the suit by this act shall be commenced and prosecuted, be party directly or indirectly to the matter or cause of the same suit; or (5) in case that any bishop or any inferior judge, having under him jurisdiction in his own right and title, or by commission, make request or instance to the archbishop, bishop or other superior ordinary or judge, to take, treat, examine or determine the matter before him or his substitutes, and that to be done in cases only where the law civil or canon doth affirm execution of such request or instance of jurisdiction to be lawful or tolerable; upon pain of forfeiture, to every person by any ordinary, commissary, official or substitute, by virtue of his office or at the suit of any person to be cited or otherwise summoned or called contrary to this act, of double damages and costs, to be recovered by action of debt or upon the case, in any of the king's high courts, or in any other competent temporal court of record, and upon pain of forfeiture for every person so summoned, cited, or otherwise called as aforesaid to answer before any spiritual judge out of the diocese or other jurisdiction where the said person dwelleth, 10*l.*, half to the king, and half to him that will sue in any of the king's said courts."

Sect. 4. "Provided always, that it shall be lawful to every archbishop of this realm to cite any person inhabiting in any bishop's diocese within his province for causes of heresy; if the bishop or other ordinary immediate thereunto consent, or do not his duty in punishment of the same."

Sect. 5. "Provided also, that this shall not extend to the prerogative of the Archbishop of Canterbury, for calling any person out of the diocese where he inhabiteth, for probate of any testament (1)."

(1) [By sect. 6 of this statute, "No archbishop, nor bishop, ordinary, official, commissary, or any other substitute or minister of any of the said archbishops, bishops, archdeacons, or other having any spiritual jurisdiction, shall demand or take of any of the

king's subjects, any sum of money for the seal of any citation to be awarded or obtained, than only 3*d.*; upon the pains and penalties before limited in this act, to be in like form recovered as is aforesaid."

[Other fees relating to the same

23 Hen. 8,
Statute of
Citations.

[But see *Fees, post*, for the fees of courts at Doctors' Commons.—ED.]

Sect. 7. "Provided also, that this act shall not be prejudicial to the Archbishop of York, for probate of testaments within his province and jurisdiction by reason of any prerogative."

Far from and out of the Diocese.—By reason of this expression in the preamble, it was doubted in the 6 Jac. 1, whether the archbishop was not at liberty (notwithstanding this act) to cite the inhabitants of London and other neighbouring places of the same diocese, into his Court of Arches, which would be no more a grievance to the subject than the being cited into the Consistory of London, and could not properly be called a citing out of the diocese, since the Court of Arches is held within the diocese of London. But all the justices of the Court of Common Pleas held, that the archbishop is restrained by this act from citing any inhabitants of London, besides his own peculiars, because the excusing the subject from travel and charges was not the only benefit intended by it, but also the benefit of appeals; and by diocese in this statute, was understood jurisdiction, and as to the language of the preamble, that the enacting parts of statutes are in many cases of larger extent than their preambles are (*m*).

In the next reign, H., 9 Car. 1, in *Gobbet's case*, the like point came under consideration again, and prohibition to the Arches being prayed, the determination was as follows:—Jones said, that he was informed by Dr. Duck, chancellor of London, that there had been for a long time a composition between the Bishop of London and the Archbishop of Canterbury, that if any suit be begun before the archbishop, it shall always be permitted by the Bishop of London; so that it is as it were a general licence, and so not sued there but with the bishop's assent; and for that reason the archbishop never makes any visitation in London diocese. And hereupon the prohibition was denied (*n*).

But in the case of *Ford v. Weldon*, H., 15 & 16 Car. 2, when the same composition was urged in the Court of King's Bench, against a prohibition to the Arches, the court was divided. Hide, Chief Justice, and Windham, against the prohibition; and Twisden and Keyling for it. Against the prohibition it was said, that the Arches is within the diocese of London, and that the composition amounts to a licence; and for the prohibition, that London is not within the jurisdiction of the Arches, and that the composition is taken away by the statute, inasmuch as no agreement between ordinaries can prejudice the people for whose benefit the statute was made (*o*).

(exclusive of the stamp duties) are to be regulated according to the particular customs of the several places.—ED.]

(*m*) Gibs. 1005.

(*n*) Ibid.; Cro. Car. 339.

(*o*) Ibid.; Sir T. Raym. 91; 1 Keb. 651.

That no manner of Person shall be from henceforth cited.]—23 Hen. 8.

But if a man is cited out of his diocese, and appears, and sentence is given, or if he submits himself to the suit, he shall have no benefit by this statute, nor will a prohibition be granted (*p*).

[“It is certainly true (says Sir John Nicholl) that both the canon and the statute law forbid the citing of parties out of their dioceses or peculiar jurisdictions. But it is equally true that the rule, at least in the statute law, was meant for the benefit of the subject, which benefit it hath uniformly, as far as I see, been held to provide for sufficiently, by giving defendants who are so cited a privilege of pleading to the jurisdiction.” Consequently, if a party who is so cited once waive that privilege by appearing and submitting to the suit, he or she is bound to the jurisdiction (*q*). It seems that a citation of the wife at the domicil of her husband is sufficient to found the jurisdiction of the Court in a suit even of nullity of marriage against the wife, wheresoever the wife may be actually resident (*r*). In all cases of a process served on a minor, the Court requires a certificate of its having been served in the presence of a natural and legal guardian of the minor; or at least, in that of some person or persons upon whom the actual care and custody of the minor, for the time being, has properly devolved (*s*).—ED.]

Privilege
may be
waived.

Citation of
Wife.

Service of,
on Minor.

Out of the Diocese.]—And that, as it seemeth, whether the see be full or vacant. For in the 13 or 14 Jac. 1, in the case of one Pickover, it was resolved upon this statute that if a bishopric within the province of Canterbury be void, and so the jurisdiction be devolved to the metropolitan, he must hold his court within the inferior diocese, for such causes as were by the ecclesiastical law to be holden before the inferior ordinary; and the prothonotaries said, it had been so formerly resolved. But a little before this, in the 11 Jac. 1, the contrary was resolved, that is, where one was cited out of his diocese before the Archbishop of Canterbury *as guardian of the spiritualties*, not only prohibition was denied, but it was further said, that if he had been cited before him as *metropolitan*, it would have been granted upon this statute (*t*).

Or peculiar Jurisdiction.]—That is, whether they be cited out of such peculiar to the Arches, or before the ordinary within whose diocese the peculiar doth lie. And Coke said, that if a man be sued out of his diocese, yet if he be sued within his own proper peculiar, he is not within this statute (*u*).

Where he shall be inhabiting.]—H., 8 Jac. 1, an attorney

(*p*) Gibbs. 1006; Carth. 33.

(*r*) [Chichester v. Donegal, 1 Add.

(*q*) [Chichester v. Donegal, 1 Add. 19.]
17; 3 Phill. 605; Prankard v. Deacle,
1 Hagg. 169.]

(*s*) [Cooper v. Green, 2 Add. 454.]

(*t*) Gibbs. 1006.

(*u*) Ibid.

23 Hen. 8.

in the King's Bench was sued in the Arches for a legacy; and, for that he inhabited in the diocese of Peterborough, prohibition was prayed and granted; because, though he remained here in term time, he was properly inhabiting within the jurisdiction of the bishop of Peterborough(y).

But, T., 17 Car. 2, when one was cited into the archdeacon of Canterbury's court for not coming to church at Biddenden in the county of Kent, and pleaded that he was an inhabitant in the diocese of Chichester, the court declared, that if a man be cited within the diocese, though he be not an inhabitant there, but only comes there to trade or otherwise, yet this is not within the statute; and that if it were otherwise, there might be offences committed within the ecclesiastical law which could not be punished at all, for men would offend in one county and then remove into another, and so escape with impunity(z).

But in the case of *Westcote v. Harding*, E., 15 Car. 2, when the suit was for tithes in the diocese of Sarum, where they lay, and prohibition was obtained upon this statute because the defendant inhabited in London; the court, upon notice that the suit was for tithes, granted a consultation, and declared that that case was not within the statute, though the contrary seems to have been agreed, T., 9 Jac. 1, in the case of *Jones v. Boyer*(a).

M., 1 Will. 3, *Woodward v. Makepeace*(b). Woodward, who lived in the diocese of Litchfield and Coventry, but occupied lands in the diocese of Peterborough, was there taxed in respect of his land, as an inhabitant, towards a rate for new casting of the bells, and because he refused to pay, was cited into the court of the bishop of Peterborough, and libelled against for this matter. And by the court, this is not a citing out of the diocese, for he is an inhabitant where he occupies the land as well as where he personally resides.

M., 11 Will. 3, *Machin v. Molton*(c). In a declaration in attachment upon prohibition, the case was, that the plaintiff lived in Nottingham, within the province of York, and there subtracted tithes, and then removed into Lincolnshire within the province of Canterbury. Afterwards he happened to go to York, and was sued there in the court of the archbishop for the subtraction aforesaid, and had a prohibition on the statute for citing him out of his diocese. But at last, after debate, a consultation was awarded, for that the subtraction of tithes is local, and by the statute of the 32 Hen. 8, c. 7, must be sued before the ordinary of that place where the wrong was done; otherwise, in cases transitory, where the action follows the person of the offender: and, as it was argued by the counsel, this

(y) Gibs. 1006; 2 Brownl. 12.

(b) 1 Salk. 164.

(z) Ibid.; Hardr. 421.

(c) 2 Salk. 549; Ld. Raym. 452,

(a) Ibid.; 1 Lev. 96; 2 Brownl. 27. 534.

is not citing out of his diocese within the statute, because the diocese where he lives hath not a jurisdiction, and if he might not be cited in this case, the thing would be remediless and dispunishable. So, if a peculiar is in two dioceses, and a man who dwells in one of the dioceses in the peculiar is cited to the court of the peculiar held in the other diocese, this is not citing out of the diocese, because it is within the peculiar (*d*).

T., 5 Ann., *Wilmett v. Lloyd* (*e*). A difference in this case was taken by Holt, Chief Justice, where a man of another diocese is taken *flagranti delicto*: he said, where the party goes into another diocese, and is commorant there, and comes back casually into the first diocese, in such case the citation cannot be good; for suppose a man comes casually into the diocese of London, and commits a crime there, and then goes back to the diocese where he dwells, and then casually comes to London again, it seemeth that he cannot be here cited; but if he had been cited before he left London, then that would be *flagranti delicto*.

Immediate Judge or Ordinary dare not, nor will not, convent the Party.]—In Archbishop Parker's register, we find the archbishop to have put benefices in another diocese under sequestration, by reason of the negligence of the ordinary; but this is an act only of voluntary jurisdiction. And before the Reformation, we find the archbishop requiring bishops to proceed against particular persons in their dioceses, or show cause why himself should not proceed (*f*).

Be Party.]—If the cause be begun before the archbishop, though the bishop or other judge (who was party in the cause) dieth whilst it is depending, and so the occasion ceaseth upon which it was first brought before the archbishop, yet he being in possession of it, it shall not be removed (*g*). For per Doderidge, J., by the civil law the death of the plaintiff or defendant is not any abatement of the libel, but they have a revivor, as we a resummons, in ravishment of ward; and the intent of the statute is not that such a cause should be remanded, whereby the plaintiff should lose the costs of his suit.

Make Request or Instance to the Archbishop.]—M., 19 Car. 2, in the case of *Bolton v. Bolton*, prohibition was prayed to the Arches for citing out of the diocese of Worcester, and day given to show cause. At the day, the plaintiff in the Arches showed letters of request from the Bishop of Worcester; to which it was objected, that this ought not to come in upon motion, but ought to be pleaded; for the statute says, they shall only be admitted where the civil or canon law doth allow; and therefore it is a matter proper to be argued, that the court may be

(*d*) [*Sed quare* in tithe and pew causes, is not jurisdiction founded by the residence of the subtractor or disturber?—ED.]

(*e*) Holt's Rep. 605.

(*f*) Gibs. 1007.

(*g*) Ibid.; Cro. Jac. 483.

23 Hen. 8.

informed by civilians, whether the law allows it or not in the present case. But prohibition was denied in the King's Bench and in the Exchequer; in both which courts it was held sufficient to exhibit the letters of request upon motion, without putting the party to plead. Also it hath been ruled upon this statute, that the archdeacon cannot send a cause depending before him immediately into the Arches; for that he hath no power to appoint another court, but only to remit his own court, and to leave it to the next: for since his power was derived from the bishop, to whom he is subordinate, he must yield it to him of whom he received it (*h*). [See "*Letters of Request*," *ante*, p. 224.—ED.]

In Cases only where the Law civil or canon doth affirm Execution of such Request or Instance of Jurisdiction to be lawful.]—It was held by the civilians, in the case of *Jones v. Jones*, T., 9 Jac. 1 (*i*), that it was absolutely in the power of the ordinary to send any cause to the archbishop at his will, without assigning any special reason; for which they cited the authority of divers canonists. But Hobart (and, as it seemeth, the court) said, that to expound the statute thus, to wit, that the ordinary may at his will and pleasure send the subject from one end of the kingdom to another without cause, was both against the letter of the statute, and did utterly elude it; that the purpose of the law was, to provide for the ease of the subject more than for the jurisdiction of the ordinary, which appears, in that there is action given to the subject and penalty to the king for the vexation, but none to the ordinary; and that this very clause says, it is to be done in cases only which the civil or canon law alloweth; which would be a vain restriction, if it were left as general as before, that is, if it were lawful or tolerable in all cases, without cause.

For Causes of Heresy.]—In the case of *Pelling v. Whiston* (*k*), H., 8 Ann., which was a cause of heresy, Dr. Pelling appealed to the Delegates from a refusal on the part of the dean of the Arches, to cite Mr. Whiston before him, upon letters of request from Dr. Harwood, commissary of the exempt and peculiar jurisdiction of the dean and chapter of St. Paul's. The ground of the dean's refusal was, that letters of request from Dr. Harwood did not lie before him, because in a case of heresy the bishop of the diocese hath jurisdiction in places otherwise exempt within his diocese; and notwithstanding the statute of citations, an heretic may be cited to appear before him upon letters of request from the judge of the peculiar; heresy being none of the five cases in which a person may be cited out of the diocese or peculiar jurisdiction within which he dwells.

For Probate of any Testament.]—In *Hughes's case*, M., 11 Jac. 1 (*l*), where one who dwelt in Somersetshire had made

(*h*) Gibs. 1007; 1 Lev. 225.(*k*) Gibs. 1007; Comyns, 199.(*i*) Gibs. 1007; Hob. 185; 2 Brownl. 27.(*l*) Gibs. 1007; Godb. 214.

his will, and his executors were libelled against in the Arches; it was said by Justice Warburton to have been agreed by all the justices, that the exception in this statute doth only extend to *probate of wills*; and prohibition was awarded.

But in the 24 & 25 Car. 2, where one was cited out of the diocese, to answer a suit for a legacy, into the prerogative where the will had been proved, prohibition was denied, because there the executor must give account and be discharged (*m*).

And by Holt, Chief Justice, in the case of *Machin v. Molton*, E., 11 Will. (*n*), if a will be proved in the Prerogative Court of Canterbury, a suit upon it for a legacy must be in the Arches, which is the provincial court, though the party lives in another diocese.

And in the case of *Edgworth v. Smalridge*, M., 3 Geo. 2(*o*), where the case was, that a prohibition was prayed to a suit for a legacy in the Arches against the executor, for that he was cited out of his diocese, and it appeared that the testator having *bona notabilia* in several dioceses, his will was proved in the Prerogative Court of Canterbury; for the defendant it was insisted, that the exception of the probate of wills draws after it necessarily an exception of suits arising upon such wills proved; that the statute is an affirmance of the canon law; that by the canon law, a will cannot be proved in the Arches, nor can legacies be sued for in the Prerogative Court, which is a point mistaken by the reporters, who say the legacy must be sued for where the will is proved; both the Prerogative and the Arches are within the archbishop's jurisdiction; and if the legatee is not suffered to sue in the Arches, he can sue no where. And the court denied the prohibition.

Where *two* are executors, and one of them lives in the diocese of London, and the other in one of the peculiars of the Arches, the suit against them as executors shall be in the Arches (*p*). [See tit. *Arches*, vol. i.]

By Can. 94, "No dean of the Arches, nor official of the archbishop's consistory, nor any judge of the audience, shall in his own name, or in the name of the archbishop, either *ex officio* or at the instance of any party, originally cite, summon, or any way compel, or procure to be cited, summoned, or compelled, any person which dwelleth not within the particular diocese or peculiar of the said archbishop, to appear before him or any of them, for any cause or matter whatsoever belonging to ecclesiastical cognizance, without the licence of the diocesan first had and obtained in that behalf, other than in such par-

Prohibited by
Canon.

(*m*) 1 Ventr. 233. [But there must be an error in the report, as a suit for a legacy must be in the Arches; though one for an inventory and account may be in the Prerogative. See title *Arches*, and GENERAL PART,

ante.—Ed.]

(*n*) Ld. Raym. 453.

(*o*) Fitz-Gib. 110.

(*p*) Gibs. 1005; 1 Roll. Rep. 328.

[It can only be for a legacy.—Ed.]

particular cases only as are expressly excepted and reserved in and by a statute 23 Hen. 8, c. 9. And if any of the said judges shall offend herein, he shall for every such offence be suspended from the exercise of his office for the space of three whole months."

By the ancient canon law, the Archbishop of Canterbury, although not as archbishop, yet as legate of the pope, had a right to cite persons out of any diocese before him in his court of audience, originally, as well as upon appeal (*q*).

Return of the
Citation
under the
old Law.

5. RETURN OF CITATION.]—The return of the citation is either personally in court by him who executed the same, who certifieth and maketh oath how and in what manner the defendant was cited; or else it is by authentic certificate, which is a kind of solemn writing, drawn or confirmed by some public authority, and ought chiefly to contain the name of the mandatory or person to whom it is directed, and the name of the judge who directed the same, with his proper style and title; likewise the day and place in which the defendant was cited, and the causes for which he is cited; in testimony whereof, some authentical seal ought to be put to it, of some archdeacon, official commissary, or rural dean; and it ought to express that they set their seal thereunto at the special instigation and request of the mandatory. To all which certificates, in all causes, as much credit is given as if the mandatory had personally made oath of the execution thereof.

But these authentic certificates are now but seldom used, unless when the mandatory, by reason of the distance, cannot conveniently appear to make oath (*r*).

Concerning this return of the citation, it is ordained by the aforesaid constitution of Otho, that "the person by whom the citation shall be executed shall not omit to certify to the judge what he shall have done in the execution thereof."

And by the aforesaid constitution of Othobon: "He to whom the citation shall be committed, when he hath faithfully executed the same, shall make certificate thereof according to the form of Otho's constitution aforesaid; otherwise no credit shall be given to a citation which shall appear to have been otherwise made, nor shall any process be directed thereupon for the person so said to be cited."

And by a constitution of Archbishop Peccham: "Whereas some rural deans are defamed for diabolical craft in citations, selling certificates thereof for money to fraudulent men, when no notice of the citation is given to the party concerned, either before making the certificate or afterwards, and so the innocent is condemned; for the cure of this we do ordain, that no certificate shall be delivered to any person, nor otherwise granted under the seal of a rural dean, until the same shall have been

(*q*) Gibs. 1008; X. 1, 30, 1.

(*r*) Conset. 28; 1 Ought. 50, 51.

publicly read upon some solemn day, during the solemnities of the mass, in the church where the person cited dwelleth or hath his most usual abode: adding moreover, that the person cited shall have sufficient space allowed to him, that he may conveniently appear at the time and place appointed; and if in some cases they are so straitened for time that there is no room for delay, then the citation being first publicly made before witnesses, the certificate shall be given in the church or in some public place before credible witnesses, so as that the day of the citation, and the place where, shall be expressed in the certificate. And in no wise shall the certificate be made before the citation. And the deans rural shall make oath for their faithful performance hereof, in the episcopal synod every year (s)."

Return of the
Citation
under the
old Law.

Until the same shall have been publicly read.]—That is, the certificate; which ought to contain the tenor of the mandate, and the form and manner of the execution thereof (t).

Upon some solemn Day.]—That is, some Sunday or holiday (u).

During the solemnities of the Mass.]—Immediately after the offertory (x).

In the Church where the Person cited dwelleth.]—Or parochial chapel (y).

That there is no room for delay.]—That is, for delaying the certificate till the next high mass (z).

Or in some public Place.]—Which may be nearer than the church; as in a market or fair, or other place of public concourse (a).

In the Episcopal Synod every Year.]—Lindwood supposeth the reason of this might be, that new deans were yearly elected; however the canon supposeth, that the bishop every year held his synod (b).

[According to modern practice, a *certificate* of the service of the citation is endorsed on that instrument, setting forth the day and place of its service on the party, signed by the person who served it: an affidavit of the truth of the certificate is also endorsed upon the instrument.

Modern
Practice.

[6. FORMS.—*Form of Citation in the Consistory Court of London, in a perturbation of Seat or Pew.*

[“C. by divine permission, Bishop of —, to all and singular clerks and literate persons whomsoever and wheresoever in and throughout our whole diocese of —, greeting: We do hereby authorize, empower and strictly enjoin and command you, jointly and severally, peremptorily to cite or cause to be cited J. J. of —, in the parish of —, in the county of —, within our diocese of —, to appear before the worshipful —, doctor of laws, our vicar-general and

(s) Lindw. 81.

(u) Ibid. 81.

(y) Lind. 81.

(a) Lind. 83.

(t) Ibid. 82.

(x) Ibid.

(z) Ibid. 82.

(b) Johns. Pecch.

official principal of our Consistorial and Episcopal Court of London lawfully constituted, his surrogate, or some other competent judge in this behalf, in the common hall of Doctors' Commons, situate in the parish of Saint Benedict, near Paul's Wharf, London, and place of judicature there, on the — day after he shall have been served with these presents, if it be a general session, by-day, or additional court day of our said Consistorial and Episcopal Court of London; otherwise on the general session, by-day, or additional court day of our said court then next ensuing, at the hour of the sitting of the court, and there to abide, if occasion require, during its continuance, then and there to answer to J. J. B., of the parish of —, in the county of —, in a certain cause of perturbation of seat or pew in the parish church of — aforesaid; and further to do and receive in this behalf as unto law and justice shall appertain, under pain of the law and contempt thereof, at the promotion of the said J. J. B.; and what you shall do or cause to be done in the premises you shall duly certify our vicar-general and official principal aforesaid, his surrogate or other competent judge in this behalf, together with these presents. Dated at — the — day of —, in the year of our Lord —, and in the — year of our translation.

(Seal.)

T. B. Proctor.

[Citation in the Consistory Court of London for Church Rate, in a Suit promoted by Churchwardens against Parishioners.

["C. by divine permission, bishop of —, to all and singular clerks and literate persons whomsoever and wheresoever in and throughout our whole diocese of —, greeting: We do hereby authorize, empower and strictly enjoin and command you, jointly and severally, peremptorily to cite or cause to be cited M. F. and C. F. respectively parishioners and inhabitants of the parish of —, in the county of —, and diocese of —, to appear personally or by their proctor or proctors duly constituted, before —, our vicar-general and official principal of our Consistorial and Episcopal Court of — lawfully constituted, his surrogate, or some other competent judge in this behalf, in the common hall of Doctors' Commons, situate in the parish of Saint Benedict, near Paul's Wharf, London, and place of judicature there, on the third day after they shall have been served with this citation, if it shall be a general session, by-day, or extra court day of our said court, or otherwise on the general session, by-day, or extra court day then next following, at the hour of ten o'clock in the forenoon, and then to exhibit, if occasion require, during the sitting of the said court, then and there to answer to H. G. and C. G., the churchwardens of the aforesaid parish of —, in the county of and diocese aforesaid, in a certain cause of subtraction of church rate or church rates, and further to do and receive as unto law and justice shall appertain, under pain of the law and contempt thereof, at the promotion of the said H. G. and C. G.; and what you shall do or cause to be done in the premises you shall duly certify our vicar-general and official principal aforesaid, his surrogate, or some other competent judge in this behalf, together with these presents. Dated at —, the — day of —, in the year of our Lord —.

—, Proctor. (L. S.)

3. *Libel* [and *Allegation.*]

A libel (*i*) is a declaration or charge, drawn up in writing, on the part of the plaintiff, unto which the defendant is obliged to answer (*k*). Nature of a Libel.

For when the defendant appeareth upon the citation, then the libel ought to be exhibited by the plaintiff, and a copy of it delivered to the defendant (*l*).

To which purpose it is enacted by the statute of the 2 Hen. 5, c. 3, as follows: "Forasmuch as divers of the king's liege people be daily cited to appear in the Spiritual Court before spiritual judges, there to answer to divers persons as well of things which touch freehold, debt, trespasses, covenants, and other things, whereof the cognizance pertaineth to the court of our lord the king, as of matrimony and testament; and when such persons so cited appear and demand *a libel of that which against them is surmised* to be informed, to give their answer thereunto, or otherwise to purchase of our lord the king a writ of prohibition according to their case; which libel to them is denied by the said spiritual judges, to the intent that such persons should not be aided by any such writ, against the law, and to the great damage of such persons so impleaded: our said lord the king, by the advice and assent of the lords spiritual and temporal, and at the request and instance of the commons, hath ordained and established, that *at what time the libel is grantable by the law, it may be granted and delivered to the party without any difficulty.*" Statute Law upon.

A Libel of that which against them is surmised.—In the second year of King James the First, all the justices of England were assembled, for their opinion (among other points) concerning the extent of this statute; whether it related only to proceedings between party and party, or also to proceedings *ex officio*, and their resolution hereupon is differently related. Croke's report of it is, that the statute is intended, where the ecclesiastical judge proceeds *ex officio* and *ore tenus*; whereas More and Noy say, it was unanimously resolved, that the statute intended only proceedings between party and party, and not proceedings *ex officio* and *ore tenus* (*m*).

From this variety of reports concerning the resolutions of the justices at that time, hath sprung a like variety in the subsequent judgments upon this head. In the 13 Jac. 1, where the High Commission proceeded not by way of libel but by articles, it was resolved, that the articles were in the nature of a libel, and so within the intent of the statute: in like manner in the 27 Car. 2, where the case was concerning articles of present-

(*i*) *Libellus*, a little book, or articles drawn out into a formal allegation. 3 Black. Com. 99.

(*k*) Gibbs. 1009.

(*l*) Wood, Civ. L. 318.

(*m*) Gibbs. 1009.

Statute Law
on Libel.

ment, it was adjudged that a copy ought to be delivered, as well on articles of presentment as on other libels, and that the reading the presentment to the party is not sufficient. And before that, in the 20 Car. 2, in the case of *Taylor v. Brown*, the court resolved, that this statute extends where the proceeding in the Ecclesiastical Court is *ex officio*, as well as between party and party; and that the report of More is ill reported, for Croke is contrary (n).

On the other hand, not only More and Noy concur in their reports of the resolution as abovesaid, but so late as the 16 Car. 2, in the case of *Scurr v. Burrell* (that is, but four years before the above-mentioned case of *Taylor v. Brown*), the court agreed, that where the libel is *ex officio judicis*, the judge is not bound to give a copy within this statute, but only where it is between party and party (o).

But after all it seemeth somewhat strange that there should be so much difficulty about this matter. It is plain enough that More and Noy report the resolution right, and that in Croke it hath been nothing but a slip of the pen, or error in the impression. It is sufficiently evident, from the words of the statute itself, that proceedings betwixt party and party are by no means intended to be excluded; for it reciteth that persons are daily cited to appear in the Spiritual Court *to answer to divers persons of things which touch freehold, debt, trespass, and the like*, all of which concern matters between party and party; the only doubt was, whether it should extend also to proceedings *ex officio*, and the case there was, that the high commissioners had deprived certain puritan ministers, proceeding against them *ex officio*, being *ore tenus convocati*. And Croke says (Cro. Jac. 37), that all the justices held, that they were lawfully so deprived: and then the justices being asked, whether a prohibition be grantable against the commissioners upon this statute, if they do not deliver a copy of the libel to the party; Croke says, that they all answered that the *statute was intended where the ecclesiastical judge proceeds ex officio et ore tenus*: but to make it consistent with what went before, he must have meant to say, that the *statute is "not" intended where the ecclesiastical judge proceeds ex officio et ore tenus*. And the nature of the case requires it; for they all held, that the ministers were lawfully deprived, and it is certain in that case they had no copy of the libel given them, for there was no libel.

Nevertheless, the law hath since been held to be otherwise: for, M., 2 Ann., it was held, that a prohibition lieth for denying a copy of the libel to any Ecclesiastical Court; for the ecclesiastical jurisdiction is limited; and the party ought to know whether the matter be within their jurisdiction, and how to

(n) Gibs. 1009.

(o) Ibid.

answer. And Holt, Chief Justice, said, that it was formerly held by all the judges of England, that when there was a proceeding *ex officio* in the Ecclesiastical Court, they were not bound to give the party a copy of the articles (o): but the law is otherwise; for in such case, if they refuse to give a copy of the articles, a prohibition shall go until it be given. And accordingly in this case a prohibition was granted by the court (p). Stamp Duty on.

But after a copy is given, the prohibition *ipso facto* is discharged, without any writ of consultation issued (q).

At what Time the Libel is grantable by the Law.—Therefore this statute was not introductory of a new law, but only an affirmance of the common law (r).

It may be granted and delivered to the Party.—In the case of *Syms v. Selwood*, M., 27 Car. 2, when the Ecclesiastical Court declared, that proclamation, or reading with an audible voice in court, was a delivery; a prohibition was granted by the temporal court, unless cause showed (s).

Without any difficulty.—And if a copy of the libel is not delivered, there is a writ in the register to compel the delivery of it (t).

Fitzherbert saith, “If a man be sued in the Spiritual Court, and the judges there will not grant unto the defendant a copy of the libel, then he shall have a prohibition directed unto them for to surcease, until they have delivered a copy of the libel (u). Which prohibition the more modern books have put under these two limitations; first, that before it is granted an oath be required of the denial of the libel (x); and secondly, that it shall not be granted at all, if the appeal is made for such denial (as for a gravamen), from an inferior to a superior court, because the party hath his election, and hath chosen another remedy (y).”

To the remedy by way of prohibition, Fitzherbert adds, that “the defendant may have an action against them upon this statute, if they will not deliver the copy of the libel, whether the cause of the libel be a spiritual cause or not (z).”

[The same principles of law, as to the form and substance of these pleas, govern both libel and allegation; the allegation being, as has been shown, an answer to the libel, and in Principles of Law respecting Libel and Allegation.

(o) [The Church Discipline Act, 3 & 4 Vict. c. 86, expressly provides that a copy of the articles shall be given to the accused clerk; see this act under title *Privileges and Restraints of the Clergy*. See *post*, *Articles*.]

(p) *Anon.* 2 Salk. 553. In this case a prohibition shall go *quousque* they deliver a copy. Raym. 991.

(q) Gibs. 1010; 6 Mod. 308.

(r) Gibs. 1009.

(s) 3 Keb. 565.

(t) Gibs. 1010; Reg. 58.

(u) F. N. B. 43. [*Anon.* 2 Salk. 553; Lord Raym. 991, acc. but not to Admiralty, *ibid.* and Com. Dig. Prohibition (D); Admiralty (F 9).]

(x) [*Anon.* 1 Vent. 252.]

(y) Gibs. 1010; [*Syms v. Selwood*, 3 Keb. 565.]

(z) Gibs. 1010; F. N. B. 43 E.

Delay to
admit Libel.

Principle *qui
ponit fatetur*.

Inferential
Averments.

What a Libel
should con-
tain.

certain causes, such as church rates, frequently altogether omitted. It often happens that the court admits part of an allegation and rejects part, or orders the whole or part to be reformed. The court (*z*) will sometimes, and in particular cases, delay the admission of a libel, in order to allow the party charged an opportunity of stating any special matter in the way of protest, to induce the court to decline further proceedings in the case. The principle *qui ponit fatetur*, that is, that he who sets up a plea is bound by it, is invariably held in the Courts at Doctors' Commons (*a*). The contents of a libel or allegation are to be presumed, in the first instance, to be true, being admitted in order to proceed to proof; and this maxim has been found in practice to be very beneficial to suitors (*b*), for if the facts alleged in the plea would not, if substantiated by evidence, entitle the party propounding them to the relief he prays, the cause is stopped *in limine*, and all further expense is saved (*c*). But the maxim does not go the length of supposing every syllable alleged to be true. Averments distinctly pleaded as facts must be assumed to be proved; but averments of an inferential and argumentative character, and which should not be lavishly introduced, are to be taken only as true to the extent that the inferences themselves can fairly be drawn from the circumstances pleaded as facts. Minor circumstances may be admitted to proof on occasions where they may illustrate other and important facts. But these circumstances must not be light or trifling; they should be of the same character as the principal charges, though not to the same extent (*d*). The *specific* proof must not be set forth in the *libel*, as well as the general averment of the charge, the former is obtained by the examination of witnesses on the latter; thus where a libel pleaded an act of adultery between two persons in one article, and in another that a certain third person was in the house and could depose to it, the judge ordered this latter averment to be struck out of the libel (*e*). In a suit for subtraction of a church rate made under the Church Building Acts, it has been held that the libel must show on the face of it that the requisites of these acts have been complied with (*f*). The best general rule for these pleas is, that they should be compressed as far as may be consistent with a perspicuous exposition of the leading facts of the case, and all unnecessary verbiage is to be avoided, as tending, in however

(*z*) [*Briggs v. Morgan*, 3 Phill. 325; 2 Consist. 328.]

(*a*) [*Grant v. Grant*, Feb. 24th, 1840, Jud. Com. of Privy Council.]

(*b*) [*Thorold v. Thorold*, 1 Phill. 1, n.; *Croft v. Croft*, 3 Hagg. 311.]

(*c*) [An exception should be made in cases of pedigree, for in these a party is not entitled to see the adverse

plea till he has set forth his own.—
Rutherford v. Maule, 4 Hagg. 238.—
Ed.]

(*d*) [*Neeld v. Neeld*, 4 Hagg. 266; *Montefiore v. Montefiore*, 2 Add. 354.]

(*e*) [*Glegg v. Glegg*, Consist. of London, Trinity Term, 1841.]

(*f*) [*Blunt and Fuller v. Harwood*, 1 Curteis, 648.]

trifling a degree, to increase the expense of the parties contesting the suit (*g*). Objections (which bear some resemblance to a demurrer at common law) to an allegation must lie either against its form or its substance: against the latter, if the asserted facts being proved (*g*) would not avail their assertor; against the former, when the statements are too diffuse or irrelevant to the issue (*h*), or such as are in their nature incapable of proof. Very recently the Judicial Committee of the Privy Council rejected an article in an allegation which charged the wife with the commission of adultery, but did not allege the adultery to have been committed at any time or place or under any circumstances whatever capable of proof (*i*). To the objection of irrelevancy of issue, it is a good defence to show that the statements complained of are strictly historical to the issue, and especially in cases where fraud is charged in the allegation objected to. In this case a latitude of pleading is allowed hardly to be conceded in any other instance; because cases of fraud, if tolerably well concerted, are generally speaking only to be detected and defeated by inductions of particulars, many perhaps apparently trivial, the exclusion of which would afford the contriver of the fraud his best chance of impunity; in such a case it is difficult to say that any facts bear too slightly upon the points at issue which bear at all; for facts are of course not pleadable which are *wholly* immaterial or irrelevant (*k*). If the court feels any doubt as to the admissibility of an allegation, its inclination is to decide in the affirmative (*l*). An allegation cannot be offered after the depositions are seen (*m*); but the whole substantive case of a party should be at once brought before the court; but where it can be clearly proved that the facts could not have been sooner pleaded, that they are *noviter perventa* to the knowledge of the parties, a supplemental allegation may be given in (*n*), especially where, in matrimonial causes, there has been a sentence *of failure of proof* (*o*), which is not considered as a definitive decision, but according to the rule of the canon law (*p*), *non transit sententia in rem judicatam contra matrimonium*; but the party may give supplemental proof, and so

Objections to Allegation.

Cases of Fraud.

Supplemental Allegation.

(*f*) [*Sandford v. Vaughan*, 1 Phill. 49.]

(*g*) [*Montefiore v. Montefiore*, 2 Add. 354.]

(*h*) [*Bird v. Bird*, 1 Lee, 531; *Moore v. Hacket*, 2 Lee, 86; *Braddyll v. Jehen*, 1 Lee, 568.]

(*i*) [*Moore v. Moore*, Feb. 6, 1840.]

(*k*) [See Sir J. Nicholl's judgment in *Locke v. Denner*, 1 Add. 356, 357.]

(*l*) [*Molony v. Molony*, 2 Add. 249; *Croft v. Croft*, 3 Hagg. 311; *Dew v. Clarke*, 1 Add. 282; *Asberry v. Ashe*, 1 Hagg. 218; and *Shand v.*

Gardiner, 1 Lee, 529; *White v. White*, 2 Lee, 20; *Reeves v. Glover*, 2 Lee, 270; *Dickinson v. White*, 1 Add. 490.]

(*m*) [*Herbert v. Helyar*, 1 Lee, 452.]

(*n*) [*Moorsom v. Moorsom*, 3 Hag. 97; *Braddyll v. Jehen*, 1 Lee, 568.]

(*o*) [After sentence has been given and the parties dismissed, the suit being at an end, it should seem there must be a fresh citation.—Ed.]

(*p*) [X. 2, 27, 7.]

Effect of
Publication.

Rescinding
the Conclu-
sion of the
Cause.

Want of Spe-
cification.

Responsive
Allegation.

establish the marriage in subsequent proceedings (*p*). The general rule is, that publication operates as a bar to prevent the right of further pleading; but the court will occasionally deviate from this rule, and what is technically termed *rescind the conclusion of the cause*, for the purpose of admitting a fresh allegation; but the facts so pleaded must be *noviter per-venta*, as has been remarked, and their earlier omission not ascribable to the *laches* of the party now averring them (*q*). And there is also another exception to the rule, namely, if a fact material to the issue has been pleaded without such specification as would enable a party to apply his defence to it by way of counter plea, and he is therefore in some degree taken by surprise on the particulars stated in the depositions of the witnesses. It is in the discretion of the court, under great caution, to allow him to give in a defensive plea after publication (*r*); but this permission will be refused where the matter has been originally pleaded with due specification, for the purpose of contradicting incidental points (*s*). The general rule (though each case may contain circumstances exempting it from the application of the rule) as to the admissibility of a responsive allegation is, that where the whole matter has been put in issue by the prior pleas, the court excludes all facts not either *explanatory* or *contradictory*, or *newly come to the proponent's knowledge*; facts of these three descriptions the proponent is entitled *de jure* to plead, and the court *de jure* bound to admit (*t*). Each party, it is to be observed, is entitled to state the circumstances in its own way, whether in an original, responsive or defensive allegation (*u*).

[The nature of an exceptive allegation is discussed under the head of *Evidence*.

[Libel in a Cause of Restitution of Conjugal Rights.

[In the name of God, Amen. Before you the worshipful J. B., Doctor of Laws, Vicar-General of the Right Reverend Father in God T. by Divine Permission Lord Bishop of —, and Official Principal of his Consistorial and Episcopal Court of —, lawfully appointed, or your surrogate or some other competent judge in this behalf, the proctor of S. K., formerly C. (wife of J. K.) of the parish of —, in the county of —, and diocese of —, against the said J. K. her husband (*x*), of the parish of —, in the county of —, and diocese

(*p*) [*Lindo v. Belisario*, 1 Cons. 220.]

(*q*) [*Middleton v. Middleton*, 2 Hagg. Suppl. 136; *Smith v. Blake*, 1 Hagg. 88; *Jones v. Jones*, 1 Hagg. 254; *Webb v. Webb*, 1 Hagg. 349; *Brisco v. Brisco*, 2 Add. 259; *Homerton v. Homerton*, 2 Hagg. 24; *Clement v. Rhodes, &c.*, 3 Add. 41.]

(*r*) [*Ingram v. Wyatt*, 1 Hagg. 101; *Halford v. Halford*, 3 Phill. 98.]

(*s*) [*Ingram v. Wyatt*, 1 Hagg. 101.]

(*t*) [*Dew v. Clarke*, 2 Add. 103, 104.]

(*u*) [The case of *Swift v. Swift*, 4 Hagg. 139, contains a specimen of a responsive allegation and a discussion upon its admissibility.—Ed.]

(*x*) [The diocese of the defendant should always be stated; that of the plaintiff is immaterial.—Ed.]

of —, and against any other person or persons whatsoever lawfully intervening or appearing in judgment before you for him, by way of complaint, and hereby complaining unto you in this behalf, doth say, and in law articulately propound as follows, to wit:

[1st. That in the months of February, March, April, or May, in the year of our Lord —, or in some or one of them, the said J. K., being then bachelor, and the said S. K. then S. C. being a spinster, and both freed from all matrimonial contracts, he the said J. K. did make his courtship and addresses to the said S. K. then S. C. spinster, and he the said J. K. and the said S. C. did mutually contract themselves in marriage, and did agree to marry each other; and they the said J. K. and S. K. then S. C. spinster, were on or about the — day of —, —, joined together in holy matrimony by the Rev. C. I. a priest in holy orders, according to the rites and ceremonies of the Church of England, who pronounced them to be lawful husband and wife; and after the solemnization of the said marriage, they the said J. K. and S. K. formerly S. C. have been, were and are lawful man and wife, and for and as such were and are commonly accounted, reputed, and taken to be by their relations, friends and acquaintance; and the party proponent doth propound every thing contained in this article, jointly and severally, and also doth propound and allege of some other time and place as shall appear from the proofs to be made in this cause.

[2nd. That from and after the solemnization of the aforesaid marriage between the said J. K. and S. K. formerly C., they the said J. K. and S. K. formerly C. consummated the same by carnal copulation and mutual cohabitation, and lived and cohabited together as lawful husband and wife, in the parish of —, —, and at other parishes and places, and the party proponent doth propound as before.

[3rd. That notwithstanding the premises the said J. K. not having the fear of God before his eyes, and being unmindful of his conjugal vow, hath, without any lawful reason, for some years last past withdrawn and still does withdraw himself from bed, board and mutual cohabitation with the said S. K. his wife, and hath refused and still doth refuse to render conjugal rights to her; and the party proponent doth propound every thing in this article contained jointly and severally.

[4th. That the said J. K. since his absence and withdrawing himself from the bed, board, and mutual cohabitation with his said wife S. K., and her conversation, hath been earnestly on her behalf and by her often entreated to live and cohabit with and treat her with conjugal affection, as by his conjugal vow he is obliged and ought: notwithstanding which entreaties he hath and still does, without any just cause, refuse to render conjugal rights to and with his said wife; and the party proponent doth propound and allege as before.

[5th. That the said S. K. formerly C. (wife of the said J. K.), the party agent in this cause, hath rightly and duly complained of the premises to you the judge aforesaid, and to this court; and the party proponent doth propound and allege as before.

[6th. That the said J. K. was and is of the parish of —, in the county of —, and diocese of —, and therefore subject to the jurisdiction of this court; and the party proponent doth allege and propound as before.

[7th. That all and singular the premises aforesaid were and are true, public and notorious, and thereof there was and is a public voice, fame and report, and of which legal proof being made, the party proponent prays right and justice to be effectually administered to him and his party in the premises, and that the marriage above libellate may be pronounced for, and the said J. K. compelled by law to take home and receive the said S. K. his wife, and treat her with marital affection, and to render her conjugal rights; and that he be condemned in the costs made and to be made in this suit on the part and behalf of the said S. K., and to be compelled to the due payment thereof by you and your definitive sentence or final decree to be given in this cause; and further to do and receive in the premises what shall be lawful in this behalf, not obliging himself to prove all and singular the premises, or to the burthen of a superfluous proof, against which the party proponent protests, and prays that so far as he shall prove in the premises he may obtain the benefit of the law being always preserved, humbly praying the aid of your office in this behalf.

[Form of Libel in a Suit for Divorce on the Ground of Adultery, promoted by the Wife against her Husband.

[In the name of God, Amen. Before you the Right Honourable Sir H. J., Knight, Doctor of Laws, Official Principal of the Arches Court of Canterbury, lawfully constituted, your surrogate, or any other competent judge in this behalf, the proctor of M. K. of the parish of —, in the county of —, deanry of —, and province of Canterbury, against W. K., the lawful husband of the said M. K. of the parish of —, in the county of —, diocese of —, and province aforesaid; and against all and every other person or persons lawfully appearing or intervening in judgment for him before you, by way of complaint and hereby complaining unto you in this behalf, doth say, allege, and in law articulately propound as follows, to wit:—

First. That in the several months of —, in the year of our Lord —, the said W. K. being then a bachelor and a minor, of the age of — years and upwards, but under the age of twenty-one years, and free from all matrimonial contracts and engagements whatever, did make his courtship and addresses in the way of marriage to the said M. K., then M. S., spinster, and the said M. K. being then a minor, of the age of — years and upwards, but under the age of twenty-one years, and also free from all matrimonial contracts and engagements whatever, did accept such his courtship and addresses, and did consent and agree to be married to him the said W. K.; that in pursuance thereof they the said W. K. and M. K. were on or about the — day of —, in the year of our Lord —, lawfully joined together in holy matrimony in the parish church of —, in the county of —, by the Rev. —, a clerk or minister in holy orders of the Church of England, or then officiating as such, according to the rites and ceremonies of the Church of England as by law established, by virtue of banns first duly had and published. And he the said Rev. — then and there pronounced them to be lawful husband and wife in the presence and hearing of divers creditable

witnesses, and an entry of such marriage was duly made in the register book of marriages kept for the said parish of —, in the county of — aforesaid. And this was and is true, public and notorious; and so much the said W. K., the other party in this cause, doth know, or hath heard, and in his conscience believes and hath confessed to be true. And the party proponent doth allege and propound, of any other time and times, place and places, and person or persons as shall appear from the proofs to be made in this cause, and every thing in this and the subsequent articles of this libel contained jointly and severally.

[Second. That in part supply of proof of the premises mentioned and set forth in the next preceding article, and to all other intents and purposes in the law whatsoever, the party proponent doth hereto annex, and prays to be here read and inserted, and taken as part and parcel hereof, a certain paper writing or exhibit marked with the letter (A.), and doth allege and propound the same to be and contain a true copy of the entry of marriage of the said W. K. and M. K., formerly M. S., in the next preceding article mentioned, that the same hath been faithfully extracted from the registry book of marriages kept in and for the said parish of —, and carefully collated with the original entry now remaining therein, and found to agree therewith. That all and singular the contents of the said exhibit were and are true, and all things were so had and done as therein contained; and that M. K. (wife of the said W. K.) late M. S., therein mentioned, and M. K. (formerly M. S.) wife of the said W. K., party in this cause, was and is one and the same person and not divers, and that W. K. also mentioned in the said exhibit, and W. K., the other party in this cause, was and is one and the same person and not divers. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Third. That from and immediately after the solemnization of the said marriage they the said W. K. and M. K. lived and cohabited together at bed and board as husband and wife, and consummated their said marriage by carnal copulation and the procreation of — children; and from the time of the said marriage, they the said W. K. and M. K. so lived and cohabited together at —, in the county of —, afterwards at —, in the county of —, and then at the city of —, and at divers other places, and so continued to live and cohabit together until on or about the — day of the month of —, in the year of our Lord —, when the said M. K. quitted W. K., and they the said M. K. and W. K. finally ceased to cohabit together under the circumstances hereinafter particularly pleaded. And the party proponent doth further allege and propound that during the time they so lived and cohabited together, they have constantly owned and acknowledged each other as and for a lawful husband and wife, and were and are so commonly accounted, reputed and taken to be, by and amongst their families, neighbours, friends, acquaintances and others. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Fourth. That shortly after the marriage of the said W. K. and M. K. as heretofore pleaded, he the said W. K. commenced

a lewd and adulterous intercourse with a female named A. W., who was resident in the —, and was in the frequent commission of adultery with the said A. W. from such time until the latter end of the month of —, in the year of our Lord —; that such adultery was committed by the said W. K. and the said A. W. as well at the house of the said A. W. herself, situate in —, as in the open air, and also in divers brothels or houses of ill fame in the said — of —, and more particularly in a house of ill fame situate in —. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Fifth. That in or about the month of — in the year of our Lord —, he the said W. K. commenced a lewd and adulterous intercourse with a female named E. H., that from such time until in or about the month of —, in the year of our Lord —, the said W. K. and E. H. were in the frequent habit of repairing together to the house of —, at —, where they went to bed together, and had the carnal use and knowledge of each other's bodies, whereby the said W. K. and E. H. committed the foul crime of adultery. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Sixth. That in or about the month of —, in the year of our Lord —, the said W. K. accompanied a female named C. S. to the house of T. J., where they retired to and were seen naked and alone together in one and the same bed, and they the said W. K. and C. S. then and there had the carnal use and knowledge of each other's bodies, whereby he the said W. K. committed the foul crime of adultery. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Seventh. That the person who had the carnal use and knowledge of the bodies of A. W., as pleaded in the 4th article, of E. H., as pleaded in the 5th article, of C. S., as pleaded in the 6th article of this libel, and W. K., the party in this cause, was and is one and the same person and not divers; and that each and every of the several females of whose body also the said W. K. had the carnal use and knowledge, as pleaded in the said several articles of the said libel, was and is the female in each several article named, and was not and is not M. K., the wife of W. K. (the party proceeded against in) and the party promoting this cause. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Eighth. That the said W. K. is or was of the diocese of —, and province of Canterbury, and therefore and by reason of the letters of request from the Rev. —, Clerk, Master of Arts, Vicar-General and Official Principal of the Consistorial and Episcopal Court of —, presented to and accepted by you the official principal aforesaid, or to and by your surrogate, and also by reason of the appearance given on his behalf, is subject to the jurisdiction of this court. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Ninth. That of and concerning all and singular the premises, it was and is rightly and duly complained to you the official principal aforesaid, and to this honourable court. And this was

and is true, public and notorious, and the party proponent doth allege and propound as before.

[Tenth. That all and singular the premises were and are true, public and notorious, and thereof there was and is a public voice, fame and report, of which legal proof being made, the party proponent prays right and justice may be effectually done and administered to him and his party in the premises, and that she may be pronounced and decreed to be divorced and separated from bed, board and mutual cohabitation with the said W. K. her husband, by reason of the adultery by him committed, by you, and your definitive sentence or final decree to be given in this behalf, and that you will further do and decree in the premises what shall be lawful, the party proponent not obliging himself to prove all and singular the premises, nor to the burthen of a superfluous proof, against which he here protests and prays, that so far as he shall prove in the premises he shall obtain in his petition the benefit of the law being always preserved to him, humbly imploring the aid of your office in this behalf.

A.

[Marriages solemnized in the parish of —, in the county of —, in the year —.

[W. K. of this parish, bachelor, and M. S. of this parish, spinster, were married in this church, by —, this — day of —, in the year —,

By me, —.

This marriage was solemnized between us { W. K.
M. S.

No.

In the presence of { J. T.
M. T.

I certify the above to be a true copy.

—, Curate.

[Libel in a Cause of Perturbation of Seat.

[In the Consistory Court of London.

B. }
against
J. }

In the name of God, Amen. Before you, the worshipful —, —, Doctor of Laws, Vicar-General in Spirituals of the Right Reverend Father in God, —, by divine permission Lord Bishop of London, and Official Principal of the Consistorial and Episcopal Court of London, lawfully constituted, your surrogate, or any other competent judge in this behalf, the proctor of J. F. B. of the parish of —, in the county of —, against S. I. of —, in the county of —, and diocese of —, and also against any other person or persons lawfully intervening or appearing in judgment for him, by way of complaint, and hereby complaining unto you in this behalf, doth say, allege, and in law articulately propound as follows, to wit:

[First. That in or about the year — the said J. F. B. became seised and possessed of a dwelling-house and premises, situate

within the said parish or chapelry of —, and subsequently purchased and built the houses, messuages, and premises situated within the said parish or chapelry of —, and he the said J. F. B., in or about the said year, went to live and reside, and hath ever since continued to live and reside in some or one of the said houses, in the said parish or chapelry of —. And this was and is true, and so much the said S. I., the other party in this cause, doth know or hath heard, and in his conscience doth believe, and hath confessed to be true; and the party proponent doth allege and propound every thing in this and the subsequent articles of this libel contained jointly and severally.

[Second. That in consequence of so being an inhabitant of the said parish or chapelry of —, he the said J. F. B., with the consent and concurrence of the minister and church or chapelwardens of the said church or parochial chapel of the said parish or chapelry, at his own expense, pulled down the partition between two pews in the body of the said church or parochial chapel, which had been occupied by the inhabitants of some of the houses of which he had become the proprietor, and converted the same into one large pew, being the pew in question in this cause, for the use of himself and his family, and from that time he and his family have constantly used and occupied the same pew, and have sat therein during the time of their attendance to hear divine service performed in the same church or chapel, and the same had also been, from time to time, when needful, repaired by him the said J. F. B. at his own expense, and he and his family have continued in the peaceable and undisturbed possession and enjoyment of the said pew from the time he became so possessed thereof, until they were molested and disturbed therein by the said S. I., as is hereinafter more particularly mentioned and set forth. And this was and is true, and the party proponent doth allege and propound as before.

[Third. That on a Sunday, happening on the fourteenth day of January, in the year —, the said S. I., and who at that time was not an inhabitant of the said parish, but merely a guest at an inn there, went to the said church or chapel, and, without any lawful authority for so doing, intruded himself, together with another person, into the aforesaid pew; and, upon C. B., the son of the said J. F. B., going to the said church or chapel for the purpose of hearing divine service, and repairing to his father's said pew, found the said S. I. and the said other person, who had so intruded themselves therein, and the said S. I., and the said other person, continued to sit therein during the time of divine service, in the forenoon of the same day. And this was and is true, and the party proponent doth allege and propound as before.

[Fourth. That on the following day the said J. F. B. having been informed of the circumstances pleaded in the next preceding article, sent a message to the said S. I. desiring that he would for the future refrain from so intruding himself into the said pew; adding that if he the said S. I. would write word that he had not done it for the purpose of insult, he would take no further notice of it, or he, the said J. F. B., sent a message to that or the like effect: notwithstanding which, on Sunday, the — day of — last, he the said S. I. again went to the same church or chapel,

and without any lawful authority intruded himself into the said pew in question in this cause and sat therein during the time of divine service in the forenoon of that day; and he the said S. I. contended and still does contend, that he has a right to use and occupy the same. And this was and is true, and the party proponent doth allege and propound as before.

[Fifth. That of and concerning the premises it hath been and is by and on the part and behalf of the said J. F. B. rightly and duly complained of to you, the vicar general and official principal aforesaid, and to this court. And the party proponent doth allege and propound as before.

[Sixth. That the said S. I. was and is of the parish of —, in the county of —, and diocese of —, and therefore and by reason of the premises was and is subject to the jurisdiction of this court.

[Seventh. That all and singular the premises were and are true, public and notorious, and thereof there was and is a public voice, fame and report, of which legal proof being made, the party proponent prays right and justice to be effectually done and administered to him and his party in the premises; and that the said S. I. may be monished that for the future he refrain from intruding himself into the pew in question in this cause, and from disturbing the said J. F. B. or his family in the quiet and peaceable possession of the same; and that the said S. I. may be condemned in the costs of this suit made and to be made on the part and behalf of the said J. F. B., and compelled to the due and effectual payment thereof by you and your definitive sentence or final decree to be given in this behalf, the party proponent not obliging himself to the burthen of a superfluous proof, against which he protests, but prays that as far as he shall prove in the premises, so far he may obtain in his petition the benefit of the law being always preserved, humbly imploring the aid of your office in this behalf.

S. L.

[Form of Libel for Church Rate brought by Churchwardens against two Parishioners.

[In the name of God, Amen. Before you, —, Vicar General of the Right Rev. Father in God —, by divine permission Lord Bishop of —, and Official Principal of the Consistorial and Episcopal Court of —, lawfully constituted your surrogate, or any other competent judge in this behalf, the proctor for H. G. and C. G. as churchwardens of the parish of —, in the county and diocese of —, against M. F. and C. F. respectively, parishioners and inhabitants of the said parish of —, and also against any and every other person and persons whomsoever, lawfully intervening or appearing in judgment for them or either of them by way of complaint, and hereby complaining unto you in this behalf, doth say, allege and in law articulately propound as follows, to wit :

[First. That the parish church of —, in the county of —, standing in need of certain repairs, and the collection of certain monies having become requisite to meet and discharge the same, as well as other

incidental charges belonging to the office of the churchwardens of the said parish, a meeting of the vestrymen of the select vestry of the said parish was held in the vestry room thereof, on or about the — day of the month of —, in the year —, pursuant to due and public notice given in the said parish church on the Sunday next immediately preceding the said day, when the vestrymen then assembled accordingly proceeded to make and did make a rate or assessment for and towards the aforesaid repairs of the said parish church, and likewise for the aforesaid other incidental charges belonging to the office of churchwarden. That in such rate the inhabitants, occupiers, landlords, owners, tenants and lessees of lands, tenements, hereditaments and premises within the said parish, rateable for the purposes aforesaid, were equally rated, assessed, and charged at and after the rate of — in the pound in proportion to the annual value of the respective lands, tenements, hereditaments and premises they respectively had, held, occupied or enjoyed within the said parish. That the said rate hath been confirmed and allowed so far as by law it may or can by —. And that in submission and conformity to the said rate or assessment, most of the parishioners of the said parish of —, therein rated and assessed, have paid the several sums of money so rated and assessed upon them. And this was and is true, public and notorious, and so much the said M. F. and C. F., the other parties in this cause, do know and in their consciences believe and have confessed to be true. And the party proponent doth allege and propound of any other time or times, place or places, person or persons, thing or things as shall appear from the proofs to be made in this cause, and every thing in this and the subsequent articles of this libel contained jointly and severally.

[Second. That in supply of proof of part of the premises pleaded and set forth in the next preceding article, and to all other intents and purposes in the law whatsoever, the party proponent doth exhibit hereto, annex and prays to be here read and inserted, and taken as part and parcel hereof, a certain paper writing marked No. 1, and doth allege and propound the same to be and contain a true copy of the rate or assessment in the said preceding article mentioned, (so far as the same relates to the said assessment on the said M. F. and C. F.), made and assessed for a certain division of the said parish of —, distinguished and known by the particular name or title of —, in which division the house and premises occupied and held by the said M. F. and C. F., and for which they were rated and assessed as aforesaid, are situated. And the party proponent doth further allege and propound, that counterparts or quadruplicates of the said rate were made for three certain other or remaining divisions of the said parish, which said divisions are severally distinguished and known by the particular names or titles of —. The whole of which said books, counterparts or quadruplicates of the said rate will be produced at the hearing of this cause. That the said paper writing or exhibit hath been carefully collated and examined with the aforesaid original rate or assessment, (so far as the same relates to the said —), and hath been found to agree therewith, and that M. F. and C. F., whose names appear in the said rate or assessment, and who appear thereby to be rated or assessed at the sum of —, upon the annual rent or sum of —, and M. F. and C. F., two of the parties in this cause, were and are the same persons and not divers. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Third. That at the time of making the rate or assessment aforesaid, and also during the period of making the several repairs and disbursements for which the said rate or assessment was so made, the said M. F. and C. F. were severally and respectively parishioners and inhabitants of the said —, and then did and now do jointly hold, occupy and possess a certain house, messuage or tenement and premises within the said parish, and were in and by the said rate or assessment duly and justly rated, assessed, and charged in respect of the said house, tenement or premises so held, occupied or possessed by them within the said parish, at the sum of — of good and lawful money of the kingdom of Great Britain, and so much they ought to pay as and for their proportion of the said rate or assessment. And this was and is true, and the party proponent doth allege and propound as before.

[Fourth. That the said H. G. and C. G., the parties promoting this suit, were duly elected, sworn and admitted into the office of churchwardens of the said parish for the year —, and were the churchwardens for the said parish at the time of the commencement of this suit. And this was and is true, and the party proponent doth allege and propound as before.

[Fifth. That the said M. F. and C. F. have been several times, or at least once requested and desired to pay or cause to be paid the said sum of —, so rated and assessed upon them as aforesaid, but have refused and still do refuse, or at least have unjustly delayed and still do delay to pay the same. And this was and is true, and the party proponent doth allege and propound as before.

[Sixth. That the said M. F. and C. F. were and are severally and respectively of the said parish of —, in the county of —, and diocese of —, and therefore and by reason of the premises were and are subject to the jurisdiction of this court. And this was and is true, and the party proponent doth allege and propound as before.

[Seventh. That of and concerning the premises it hath been and is on the part and behalf of the said H. G. and C. G. rightly and duly complained to you, the vicar general and official principal aforesaid, and to this court. And the party proponent doth allege and propound as before.

[Eighth. That all and singular the premises aforesaid were and are true, public and notorious, and thereof there was and is a public voice, fame and report, of which legal proof being made, the party proponent prays that right and justice may be effectually done and administered to him and his said parties in the premises, and that the said M. F. and C. F. may be condemned in the said sum of —, so rated and assessed upon them as aforesaid, and also in the costs made and to be made in this cause on the part and behalf of the said H. G. and C. G., the churchwardens aforesaid, and that they may be compelled to the due payment thereof by you and your definitive sentence or final decree, to be given and interposed in this cause, and that further may be done and decreed in this behalf what shall be just and lawful. The party proponent not obliging himself to prove all and singular the premises, nor to the burthen of a superfluous proof, against which he protests, but prays that so far as he shall prove in the premises, so far he may obtain in his said suit the benefit of the law being always preserved, humbly imploring the aid of your office in this behalf.

[M. S.
[H. J.

[Form of Allegation in Prerogative Court on behalf of a Next of Kin of the Deceased contesting the Validity of a Will.]

[In the Prerogative Court of Canterbury.]

[On the first session of Michaelmas Term, (to wit,) Friday the sixth day of November, in the year of our Lord 18—.]

C. Q. }
against }
M. W. }

[On which day R., in the name and as the lawful proctor of C. Q., (wife of I. Q.) the natural and lawful sister and only next of kin of W. G., the party in this cause deceased, and under that denomination, and by all better and more effectual ways, means, and methods which may be most beneficial for his said party, did say, allege, and in law articulately propound as follows, to wit :

[First. That the said W. G., the party in this cause deceased, died on the — day of — last, in consequence of having shot himself with a pistol, being then in an insane state of mind. That he died a widower, without child or parent, aged about — years, leaving him surviving the said C. Q. (wife of I. Q.) his natural and lawful sister, and only next of kin, and a niece, the child of another sister, who died in his life-time, the only persons who will be entitled to his personal estate and effects, in case he shall be pronounced to have died intestate. That the said deceased was at the time of his death possessed of and entitled to personal estate and effects of the value of 1,200l. or thereabouts, and of real estate of the value of 700l. or thereabouts. And this was and is true, public and notorious, and the party proponent doth allege and propound every thing in this and the subsequent articles of this allegation contained jointly and severally.

[Second. That the said deceased at all times, whilst he retained the use of his mental faculties, had and expressed a regard and affection for his said sister, the said C. Q., party in this cause, who had a family of six children, and declared his intention to leave her a considerable portion of his property by his last will and testament, or to that effect. And this was and is true, public and notorious ; and the party proponent doth allege and propound as before.

[Third. That the said deceased, who was always of very weak and slender capacity, and very eccentric in his manners and behaviour, but more particularly during the last ten or twelve years of his life, after the decease of his wife became very inconsistent in his conduct, and laboured under an aberration of mind. That in consequence thereof, he, the deceased, was liable to be imposed upon by artful and designing persons, and that owing to impositions practised upon him by such during the said last ten or twelve years of his life he lost and was deprived of considerable sums of money and other portions of his property ; that he frequently forgot what he said and did and directed to be done by others shortly afterwards ; talked in a wild, rambling, and incoherent manner ; expressed great apprehension that he had or should become poor and distressed and die in the workhouse ; became very much altered in his person and appearance, neglected his dress, and did so many strange and extraordinary acts that he was looked upon and considered by the different persons who saw and had transactions with him to be (as in

fact he was) of unsound mind, memory, and understanding. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Fourth. That in the month of July, in the year 1827, the said deceased, who was then of unsound mind, went from his residence at C. P., within the borough of P., in the county of —, to a public house known by the sign of the —, in the said borough of P., and shortly afterwards removed from thence to the house of Mr. G. W., being a public inn, known as the Bradley Inn, at N. B. in the said county. That on such occasion he took with him a common woman of the town, whom he requested the said Mr. G. W. and the waiters and other persons belonging to the said inn to call Mrs. G., and to whom he himself behaved with great respect and deference, and to whom he desired and appeared to expect that others would behave in like manner; and whilst staying at the said inn he took a cottage in the neighbourhood for the term of seven years and had his furniture brought from his house at P. aforesaid, and from the said public house called the N. T., and placed in the said cottage. And the party proponent doth further allege and propound, that in a few days afterwards, I. W., the elder, the father of I. W., the husband of M. W., the other party in this cause, came to N. B. aforesaid, and took the said deceased to his, the said I. W. the elder's house at C., in the said county, and within a day or two afterwards he the said I. W. the elder went with two waggons, and without the concurrence or direction of the deceased, removed all his, the said deceased's, said furniture from the said cottage to the house of his son the said I. W., at W., in the county of Devon; that on such occasion the said deceased was represented by the said I. W. the elder to be decidedly insane and totally unable to conduct himself or his affairs in a rational manner, and that he ought to have had some person constantly with him to take care of him, and that his, the deceased's relations, had been quite distressed to know what had become of him, or to that effect; and the said I. W. the elder, without reference to the deceased or any authority from him, paid the landlord of the said cottage the sum of —l., or some other sum of money, as a compensation on his relinquishing the agreement of the said deceased for the hire of the same as aforesaid. That the said deceased on such occasion took no part in the said transaction, and neither expressed any acquiescence in or dissent from the acts of the said I. W. the elder, but appeared to be and was unconscious of the effect thereof, and was behaved to and treated by the said I. W. the elder and others, as in fact he then was, a person of unsound mind and understanding. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Fifth. That the said M. W. and her husband and their family lived and resided with the deceased at his house at —, which was his own freehold, from on or about the months of — or —, 18—, to the time of his death; that they acquired and exercised an undue ascendancy and control over him; and they and their relations and connexions behaved to and treated the said deceased as, and declared that he was, a person incompetent to manage and conduct his affairs and of unsound mind. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Sixth. That upon an occasion happening either in the month of —, 18—, or —, 18—, the said M. W., the other party in this

cause, during a conversation with *W. T.*, a cabinet maker, residing at *P.*, declared to the said *W. F.* that she wished the old man (thereby meaning the said *W. G.*, the party in this cause deceased) dead, as he was as mazed as ever, thereby meaning as mad as ever, as she, the said *M. W.* expressed herself to that effect. That at or about the same period he, the said *W. F.*, inquired of the said deceased to whom he intended to bequeath his property, and whether he had not any brothers or sisters? to which the deceased replied that he had none left, or to that effect. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Seventh. That on an occasion happening some time on or about the month of —, 18—, the said *M. W.*, the other party in this cause, called at the house of a *Mrs. F.*, sister to the said *W. F.*, who was then residing at *Plymouth* aforesaid, and also said to her, the said *Mrs. F.*, that she wished the old man (thereby meaning the said *W. G.*, the party in this cause deceased) dead, for he was as mazed as ever, or to that effect. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Eighth. That the making and writing of the pretended will of the said deceased propounded in this cause on the part and behalf of the said *M. W.* was not the free and spontaneous act of the said deceased, but was procured to be made and written by him by the arts and contrivance of the said *M. W.* and *I. W.* her husband, who took advantage of the weak and unsound state of the deceased's mind for that purpose. That in the course of writing the same the deceased several times complained of the great inconvenience he felt from writing, and wished not to complete the said pretended will, but was compelled or induced to go on and finish the same by the threats and importunities of the said *M. W.* and *I. W.*, and of *Y.*, who is a relation of the said *I. W.* and steward to the Earl of *M.*, all of whom were present with the said deceased at such time, and urged him to write and afterwards to execute the said pretended will. That from the conduct and behaviour of the said deceased on such occasion he appeared to be, as in fact he was, a person of unsound mind and incapable of making his will or doing any act of that or the like nature, which required thought, judgment and reflection. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Ninth. That on an occasion happening some time in or about the month of —, in the year 18—, *S. W.* a tax-collector in the borough of *Plymouth*, and who was well acquainted with the said *W. G.*, deceased, being in the habit of frequently seeing him, called at the deceased's house in order to receive the taxes for the same, when a conversation took place between them on various subjects, but more especially in regard to the said *C. Q.*, his the deceased's sister. That the deceased then declared to the said *S. W.* that he was very desirous to see his said sister, meaning the said *C. Q.* and her children, but that they about him, meaning the said *M. W.* and *I. W.* and *I. W.* the elder, would not suffer him to do so, or to that effect, and the deceased also observed that the *W.*'s, meaning the said *M. W.*, *I. W.* and *I. W.* the elder, had nearly ruined him, that he was afraid of coming to the parish, that Earl *M.*'s servant, meaning *Y.*, mentioned in the eighth article of this allegation, had got every thing from him, that he had done a very foolish act at the Earl of *M.*'s, meaning the execution of the pretended will as

pleaded in the next preceding article, and that they had ill used him ever since, and that Mrs. W., meaning the said M. W. kept him from seeing or writing to his sister, meaning the said C. Q., or to that effect. And the deceased again observed that he should like very much to see his sister, meaning the said C. Q., but he was afraid to write to her without the W.'s, meaning the said M. W. and I. W., gave him the form of a letter in order that he might copy it, or to that effect. That upon the said occasion, he the said deceased appeared to labour under a very great terror of the said M. W., and expressed his fears lest she should overhear their conversation. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Tenth. That shortly after the said deceased had been compelled or induced to write and execute the said pretended will propounded in this cause, as pleaded in the eighth article of this allegation, he entertained an idea that the same was a deed of gift, and that he had thereby deprived himself of his property or of some considerable portion thereof, he became still more affected and distressed in his mind, and more frequently expressed his fears that he must go or should be taken to a workhouse, hoping in that event he should be taken to a workhouse at some distance, where he would not be known, and at length, under the influence of such ideas or apprehensions, he destroyed himself by shooting himself with a pistol as aforesaid. That a coroner's inquest was thereupon duly held upon the body of the said deceased, of which the said Y. was foreman; and the jury so impannelled by their verdict found that the said deceased at such time was in an unsound state of mind, or to that effect. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Eleventh. That all and singular the premises were and are true and so forth.

[Form of Responsive Allegation.

[In the Prerogative Court of Canterbury.

On the first session of — term, to wit, the — day of —, in the year of our Lord —.

C. Q. }
against
M. W. }

[On which day Y. Z., in the name and as the lawful proctor of M. W. (wife of J. W.) and under that denomination, and by all better and more effectual ways, means, and methods, and to all intents and purposes in the law whatsoever which may be most beneficial and effectual for his said party, said, alleged, and in law articulately propounded as follows, to wit:

[First. That W. G. late of —, in the parish of —, in the county of —, the deceased in this cause, was at all times as well before as after the making and execution of his last will and testament, bearing date the — day of —, in the year —, of sound mind, memory, and understanding, talked and discoursed rationally and sensibly, and well knew and understood what he said and did, and what was said and done in his presence, and was fully capable of making and executing his last will and testament in writing, or of doing any other serious or rational act of that or the like nature

requiring thought, judgment, and reflection, and although rather eccentric in his manners, never laboured under any aberration of mind, save in the instance of his having put an end to his existence by shooting himself; and this was and is true, public and notorious, and so much C. Q., the other party in this cause, doth know and in her conscience hath confessed to be true. And the party proponent doth allege and propound every thing in this article contained jointly and severally.

[Second. That the said deceased for many years before and until the time of his death had a very great regard and affection for the said M. W., who was the — of his late wife —, who died in the year —, and he the said deceased frequently and down to the time of his death declared such his regard and affection for her, and that she should be the object of his bounty at the time of his death, and made other declarations to that or the like effect. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Third. That the said deceased became very much offended with the said C. Q. for marrying the said J. Q. against his consent, which marriage took place about — years since, on which occasion, and frequently afterwards, the said deceased declared that he never would have any concern with her, and the said deceased for several years before his death had no intercourse with the said C. Q., and frequently and down to a late period of his life declared that she never should have any part of the property which he possessed, that if he had ten thousand pounds she never should have a shilling of it, for it would be useless to give her any thing as her husband would spend it if he did; and he, the said deceased, made other declarations to that or the like effect. And this was and is true, public and notorious, and so forth.

[Fourth. That in the month of —, in the year —, the said deceased having become acquainted with a woman before unknown to him, and having engaged her to live with him as his housekeeper, at a cottage at N. B., in the county of —, mentioned in the fourth position or article of a certain allegation given in and admitted in this cause on the part and behalf of the said C. Q., which cottage he had entered into an agreement to take for years, and having soon after been informed that such woman was of bad character, he directed the said M. W. to send for J. H., the elder, the father of her said husband, and who resided at C., about five miles from P., for the purpose of enabling him the said deceased to advise with him what steps he should take; and the said J. W., the elder, having come to P., and the said deceased having met him, the said deceased informed him that he had something particular to say to him, and requested the said J. W. to accompany him to an inn for the purpose of holding a conversation with him, that they accordingly went together to the Lamb Inn in that town, and when alone in a room therein the said deceased informed the said J. W. that he had taken a cottage at N. B. aforesaid, and had sent furniture thereto, and had engaged a housekeeper who was then therein, and that he had subsequently received information that she was a woman of bad character, and he was determined not to reside in the said cottage or to see the said woman again, and he requested the said J. W., the elder, to go to N. B. to see E. the landlord of the said cottage, and make an arrangement with him, so

that he, the said deceased, might quit and surrender the said cottage, and also to see the said woman and prevail on her to quit the said cottage, and also to bring from thence the furniture which he, the said deceased, had sent thereto, and of which the said deceased delivered to the said J. W., the elder, an inventory in his own handwriting, and gave his directions as to packing some part thereof, and for the purpose of carrying such the intention of the said deceased into effect he, the said deceased, delivered to the said J. W. a draft or cheque, which he had drawn on Messrs. H. and N., his bankers, for thirty pounds, and requested him to pay what further money, if any, might be necessary; and the said deceased also in the presence of the said J. W., the elder, wrote and addressed a letter to the said woman, and read the same to the said J. W., the elder, and by such letter he informed her that he had thought better of the arrangement which he had made for residing at N. B. and having her as his housekeeper, and desired her to leave the said cottage and give up to the said J. W., the elder, all his, the deceased's furniture and things therein then in her possession, and he in the said letter also declared that the said J. W. was desired by him the said deceased to pay her the sum of ten pounds wages and compensation for her being dismissed so suddenly or to that effect, that the said J. W. accordingly went to N. B. and delivered to the said woman the said letter, who read the same aloud in the presence of the said J. W. and also of the said — E., who had accompanied him to the said cottage, and the said woman retained the said letter, and the same hath not since come into the possession or power of the said M. W. or J. W. her husband, that the said J. W. sen. paid to the said woman ten pounds as directed in the said letter, and packed up all the said furniture and other effects of the said deceased, and sent the same to the house of his son the said J. W. at W., he having been desired by the said deceased so to do, and the said J. W., the elder, after conference with the said E., agreed to pay and did pay him twenty-five pounds as a compensation for the loss which he declared he probably should sustain by permitting the said deceased to quit the said cottage and ceasing to be the tenant thereof; that two or three days afterwards the said J. W., the elder, called on the said deceased, who was then at the said J. W.'s house at W., where the said deceased settled with the said J. W., the elder, the account of the expenses by him in executing such the order and directions of him, the said deceased, so as aforesaid given to him; and the party proponent doth further allege and propound that the said J. W., the elder, did not on the occasion mentioned in this article represent the said deceased to be insane or unable to conduct himself or his affairs in a rational manner, or declare that he ought to have had some person constantly with him to take care of him, nor did he or any other person behave to or treat him as a person of unsound mind, as in the said fourth position or article is falsely alleged and pleaded, but that on the contrary the deceased was perfectly collected and rational, and quite competent to the management of that or any other business whatever. And this was and is true, public and notorious, and so forth.

[Fifth. That after the said deceased had determined to quit the aforesaid cottage at N. B., he returned to the lodgings which he had previously occupied in the house of W. H., in C. P., where he remained about a fortnight, but being dissatisfied with the accommoda-

tion there he went to live and reside with the said J. W. and his said wife M. W. at their farm at W., in the said county of —, where he continued to live and reside until the month of November, in the said year —, when the said deceased purchased the freehold house in B. P., within the borough of P., mentioned in his last will and testament, and removed his furniture to such house, and by the desire of the said deceased the said J. W. and M. W. went to reside with him in such house, and they continued to live and reside together until his death; but the party proponent doth expressly allege and propound that the said M. W. and J. W., her husband, did not nor did either of them ever acquire or exercise any undue ascendancy or control over the said deceased, nor did they or either of them or their relations or connection behave to or treat the said deceased as, or declare that he was a person incompetent to manage or control his affairs, or of unsound mind, as in the fifth position or article of the said allegation is falsely alleged and pleaded. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Sixth. That after the said deceased had so as aforesaid gone to reside in the said house in B. P., to wit, some time in the month of January, in the year —, he the said deceased declared to R. S. that the said house had cost him eight hundred pounds, and that he intended to give the same to P., thereby meaning the said M. W., and that he should also give her other property, or to that effect. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Seventh. That the making and writing of the last will and testament of the said deceased propounded in this cause, bearing date the second day of February, one thousand eight hundred and twenty-eight, was a free and spontaneous act of the said deceased, and was not procured to be made by any acts or contrivance of the said M. W. party in this cause, or her husband J. W., neither of whom knew that he had made such will until some time after the execution thereof; nor did the deceased complain of any inconvenience he felt from writing, or a wish not to complete the same, nor was he compelled or induced to go on and finish the same by the threats and importunities of the said M. W. and J. W., or of J. Y., the steward to the Earl of M., nor is the said J. Y. in any manner related to the said J. W., or to his wife the said M. W., as in the eighth position or article of the said allegation is falsely alleged and pleaded; and the party proponent doth further allege and propound, that neither the said M. W., nor J. W., nor J. Y., were present at such time or in the house wherein the same was written or executed. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Eighth. That after the said deceased had wrote and executed his said will he did not entertain an idea that the same was a deed of "gift," or that he had thereby deprived himself of his property or of a considerable part of it, and in consequence thereof became distressed in his mind, or express his fear that he must go or should be taken to a workhouse, as in the ninth position or article of the said allegation is falsely alleged and pleaded; on the contrary, he, the said deceased, several times recognized his said will and declared that on his death the said M. W. and her husband would be materially benefitted, or to

that effect, that when repairs were doing at his said house in B. P., in or about the month of December, one thousand eight hundred and twenty-seven, the said — declared he was doing all for the benefit of the said J. W. and M. W., or to that effect; and on or about Thursday the twelfth day of June, in the said year one thousand eight hundred and twenty-eight, the said deceased attended the christening of W. a child of the said J. W. and M. W. his wife, on which occasion he, the deceased, distinctly declared to the said R. S. that he had made his will, and that he had given P., thereby meaning the said M. W., his house in B. P. and every thing in it, and had also given her further property, as he had before told him he meant to do, and that he had made her executrix, or to that effect. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[Ninth. That all and singular the premises were and are true, public and notorious, and so forth.

[4. Articles.

[Where the office of the judge is promoted, the whole transaction must be fairly and specifically stated, in order, first, that the judge may consider whether he ought to allow his office to be promoted, which the judge perhaps may refuse, if both parties are *in pari delicto*; and secondly, that the defendant may be enabled, without injustice to himself, to give an affirmative issue (s). The *general* words of articles are construed only to include subordinate charges *ejusdem generis* with the principal (t), while the *præsertim* is looked to for the principal accusations (u). The court cannot go beyond the particular offence charged, nor the articles beyond the citation (x). But in a criminal suit for incest, a marriage may be annulled although the citation contained no evidence to that effect (y). On the other hand, though the promoter's motives may be shown in a defensive plea to be malicious and vindictive, because such conduct would affect both the question of costs and the credit of his witnesses, yet such defensive plea must be specific, and confined to the promoter's conduct with reference to the defendant (z). According to practice, the promoter of the office of the judge is bound not only to give in articles, but also a *correct copy* to the defendant—an error in the *copy* being as fatal to the suit as an error in the *original* (a).

General
Requisites of.

(s) [Oliver v. Hobart, 1 Hagg. 43; Lee v. Mathews, 3 Hagg. 174; Moorsom v. Moorsom, 3 Hagg. 97; Wynn v. Davies and Weaver, 1 Curteis, 89.]

(t) [Bennett v. Bonaker, 3 Hagg. 25.]

(u) [Ibid.]

(x) [Breeks v. Woolfrey, 1 Curteis, 880.]

(y) [Chick v. Ramsdale, 4 Curteis, 34.]

(z) [Bennett v. Bonaker, 3 Hagg. 25.]

(a) [See Williams v. Bott, 1 Cons. 1; and Thorpe v. Mansell, cited in note; and ante.]

Effect of
Misnomer.

[It is not a fatal objection that the articles are exhibited in the name of the surrogate, and not of the judge (*b*), or in the name of the bishop instead of his official (*c*); but where the office of the judge is wrongly described, the error is fatal, and may be pleaded in bar of further proceedings (*d*).

When
Articles are
to be ex-
hibited.

[The general rule is, that articles must be brought in on the court day immediately subsequent to that on which the defendant has appeared (*e*).

Amendment
and admissi-
bility of
Articles.

[Articles once brought in may be reformed and amended under the direction of the court prior to their actual admission, but when they are once admitted and issue is joined, either party is bound by them; and it must be borne in mind, that the promoter is not at liberty to drop in with charges one after another, with perhaps this single exception, that offences *ejusdem generis* subsequently committed may be pleaded in subsequent articles (*f*). But circumstances may justify the admission of further articles explanatory to a responsive allegation (*g*), or where it is clearly shown that they could not have been sooner pleaded (*h*).

When the
Court is
bound to ad-
mit them.

[If the articles contain a substantive charge, the court is bound to *admit* them, and cannot listen to a suggestion that they do not truly detail the circumstances (*i*), though the court is strictly confined to a consideration of the offences charged in the articles (*j*). In a case where the alleged offences were laid from September 1824 till January 1827, and the suit was instituted in April 1828, the lapse of time was held to be no bar (*k*).

[*Articles (l) in the Arches Court of Canterbury, for the Punishment and Correction of a Clerk in Holy Orders guilty of Incontinence, &c.*

[*In the name of God, Amen. We, H. J., Knight, Doctor of Laws, Official Principal of the Arches Court of Canterbury, lawfully constituted, to you the Reverend L. M., rector of the parish of —, in the county of —, in the archdeaconry and commissaryship of —, in the diocese of —, and province of Canterbury, all and every the heads, positions, articles and interrogatories, touching and concerning the lawful correction and reformation of your manners and excesses, and more especially for*

(*b*) [Prankard v. Deacle, 1 Hagg. 169.]

(*c*) [Maidman v. Malpas, 1 Consist. 209.]

(*d*) [Williams v. Bott, 1 Consist. 1. Vide ante, "Effect of Misnomer," under title Citation, p. 246.]

(*e*) [Dobie v. Masters, 3 Phill. 175; Schultes v. Hodgson, 1 Add. 321.]

(*f*) [Schultes v. Hodgson, 1 Add. 321.]

(*g*) [Roper v. Roper, 3 Phill. 97.]

(*h*) [Moorsom v. Moorsom, 3 Hagg. 97.]

(*i*) [Jarman v. Bagster, 3 Hagg. 356.]

(*j*) [3 Hagg. 50.]

(*k*) [Bennett v. Bonaker, 2 Hagg. 25.]

(*k*) [See Rule 9 of Orders of Court, ante.]

(*l*) [For articles against a person for teaching in a grammar school, see title *School*, in this volume.]

incontinence, for profane cursing and swearing, indecent conversation, drunkenness and immorality, and for neglect of divine service on divers Sundays, do, by virtue of our office, at the voluntary promotion of Y. Z., article and object as follows :

[First. We article and object to you, the said L. M., that by the ecclesiastical laws, canons and constitutions of the Church of England, all clerks and ministers in holy orders are particularly enjoined and required to be grave, decent, reverend and orderly in their general deportment and behaviour in every respect, and to abstain from fornication or incontinence, profaneness, drunkenness, lewdness, profligacy, or any other excess whatever, and from being guilty of any indecency themselves, or encouraging the same in others; but that, on the contrary, they are enjoined, at all convenient times, to hear or read some of the Holy Scriptures, or to occupy themselves with some other honest study or exercise, always doing the things which shall appertain to honesty, and endeavouring to profit the Church of God, bearing in mind that they ought to excel all others in purity of life, and to be examples to other people, under pain of deprivation or other ecclesiastical punishment or censures, as the exigency of the case and the law thereupon may require and authorize, according to the nature and quality of their offences; and this was and is true, public and notorious, and so much you the said L. M. do know or have heard, and in your conscience believe to be true; and we article and object to you of any other time, place, person or thing, and every thing in this and the subsequent articles contained jointly and severally.

[Second. Also we article and object to you the said L. M., that you were and are a priest or minister in holy orders of the Church of England, and that on or about the — day of —, in the year of our Lord —, you were duly and lawfully admitted and instituted in and to the said rectory and parish of —, in the county of —, and that an entry thereof was duly made in the muniment book kept in the episcopal registry of the Lord Bishop of —, at —, for the diocese of —; and that you were afterwards duly and lawfully inducted into the actual and corporal possession of the said rectory, and for and as the lawful rector of the said rectory and parish, you have ever since been and now are commonly accounted, reputed, and taken to be. And this was and is true, public and notorious, and we article and object to you as before.

[Third. Also we article and object to you the said L. M., that in supply of proof of the premises mentioned in the next preceding article, and to all other intents and purposes in the law whatsoever, the promoter of our office doth exhibit and hereto annex and prays to be here read and inserted, and taken as part and parcel hereof, a certain paper writing, numbered —, and doth allege and propound the same to be and contain a true and authentic copy of the act so entered and made in the said muniment book kept in the episcopal registry of the Lord Bishop of — for the said diocese as aforesaid, on your admission and institution in and to the said rectory and parish of —, as mentioned in the next preceding article; that the same has been carefully

collated with the original entry now appearing in the said muniment book and found to agree therewith, and has been signed by —, the deputy registrar of the said diocese; and that all and singular the contents of the said exhibit were and are true, that all things were had and done as are therein contained, and that L. M. therein mentioned, and you the Rev. L. M. the party accused and complained of in this cause, were and are one and the same person, and not divers, and that the rectory of — therein mentioned, to which you were so admitted and instituted, and the rectory and parish of —, several times mentioned in these articles, was and is one and the same place, and not divers. And this was and is true, public and notorious, and we article and object to you as before.

[Fourth. Also we article and object to you the said L. M., that in the latter end of the year — you engaged —, spinster, as a servant, and that she thereupon entered into your service, and went to reside in the said rectory house; that you soon afterwards formed a criminal connection with her, and had the carnal use and knowledge of her body, and that she thereby became pregnant by you; that you continued to carry on such criminal connection during the time she remained in your service, which was for about six months; that upon her leaving your service she was pregnant, and afterwards, to wit, in the month of —, was delivered of a bastard child in the parish of —, in the county of —. And this was and is true, public and notorious, and we article and object to you as before.

Fifth. Also we article and object to you, the said L. M., that in the latter end of the year —, or the beginning of the year —, you engaged —, spinster, as a servant, and she thereupon entered into your service, and went to reside in the said rectory house; that you soon afterwards formed a criminal connection with her, and had the carnal use and knowledge of her body, and she became pregnant by you; that you continued to carry on such criminal connection for several months during the said year —; that the said — left your said service, she being at such time pregnant by you, and was afterwards, to wit, on the — day of —, in the said year —, at —, in the parish of —, in the county of —, delivered of a — bastard child. And this was and is true, public and notorious, and we article and object to you as before.

[Sixth. Also we article and object to you, the said L. M., that for several years past you have addicted yourself to habitual and excessive drinking of wine and spirituous liquors, and particularly rum, so as to be frequently much intoxicated, and that you have also frequently been guilty of the vice of profane cursing and swearing; that you have at various times sworn at your servants and labourers, and made use of much profane language, and many oaths. And this was and is true, public and notorious, and we article and object to you as before.

[Seventh. Also we article and object to you, the said L. M., that on a — in the month of —, about — o'clock in the —, you were intoxicated, and being in the — of the said parish, you made use of many profane oaths, and swore at —,

a —, who was then employed by you as a —, and to look after your concerns, and called him —; which expressions you repeated immediately afterwards, on the same day, in your own —, adjoining the said rectory house. And this was and is true, public and notorious, and we article and object to you as before.

[Eighth. Also we article and object to you, the said L. M., that the duty which has always been accustomed to be done at the said church on a Sunday has been the morning service and a sermon, and that on Sunday, the — day of —, you, without just cause or impediment, wholly omitted to perform such service; and we further article and object to you that, without just cause or impediment, you wholly omitted to perform divine service in the said church on Sunday, the — day of —, and also on every Sunday subsequent thereto, until Sunday, the — day of — following, and that you also omitted to perform any such service on Sunday, the — day of —, and that on the aforesaid Sundays respectively no divine service whatever was performed in the said church. And this was and is true, public and notorious, and we article and object to you as before.

[Ninth. Also we article and object to you, the said L. M., that for your aforesaid fornication or incontinence, profane cursing and swearing, indecent conversation, drunkenness and immorality, and neglect of duty, and other crimes and excesses, you ought to be canonically punished and corrected, and we article and object to you as before. Also we article and object to you, the said —, that you are of the parish of —, in the archdeaconry and commissaryship of —, in the diocese of —, and province of Canterbury, and therefore and by reason of the premises, and of the letters of request from the Worshipful —, Master of Arts, Commissary of the Honourable and Right Reverend Father in God, —, by divine permission Lord Bishop of —, in and throughout the whole archdeaconry of —, in the diocese of —, lawfully constituted, presented to, and accepted by us in this cause, were and are subject to the jurisdiction of this court, and we article and object to you as before.

[Tenth. Also we article and object to you, the said L. M., that the said Y. Z., the party agent in this cause, hath rightly and duly complained to us, the judge aforesaid, and to this court, and we article and object to you as before. Also we article and object to you, the said L. M., that all and singular the premises were and are true, public and notorious, and thereof there was and is a public voice, fame and report, of which legal proof being made to us, the judge aforesaid, and to this court, we will that you, the said L. M., be duly and canonically punished and corrected, according to the exigency of the law, and also be condemned in the costs of this suit, made and to be made by and on the part and behalf of the said Y. Z., the party agent and complainant, and compelled to the due payment thereof by our definitive sentence or final decree, to be read and promulged, or made and interposed in this cause; and further, that it shall be done and decreed in the premises as shall be lawful and right in this behalf, the benefit of the law being always preserved.

[Articles promoted against a Parish Clerk (m).]

[In the name of God, Amen. We, J. T., Doctor of Laws, Vicar General and Official Principal of the Right Reverend Father in God, John, by divine permission Lord Bishop of Lincoln, lawfully constituted, do at the promotion of the Rev. S. A., clerk, vicar of the parish church of L., in the county of L., minister and object unto you L. B., of the same parish, certain articles touching and concerning your misbehaviour and abuse of and neglect of your office as parish clerk of the said parish of L.; your lewd, obscene and indecent behaviour in the ringing chamber of the church of L.; your purloining or embezzling the bread committed to your charge for the use of the poor of the said parish; your abusive and opprobrious language to the said Rev. Mr. A., the vicar; your tampering with the Rev. Mr. W. H., late curate of the said parish of L., with intent to have defrauded the said Mr. A. of his dues, and your drunkenness and immorality, as follows, to wit:

[First. We article and object to you the said L. B., that not only by the laws, canons and constitutions ecclesiastical of this realm, but also of common right, the right of nomination of parish clerk, as in the minister of the parish and the vicar of the parish of L., in the county of L., hath the right of nomination of and to choose the parish clerk of the said parish, and the vicar thereof for the time being hath always nominated and chose the parish clerk of the said parish, and we article and object to you the said L. B. jointly and severally, and of every thing therein contained.

[Second. We article and object to you the said L. B., that upon a pretended suggestion of your having been nominated parish clerk of L. aforesaid by the then vicar of the said parish (which nomination the party promoter doth not admit or confess, but on the contrary denies to be true), you had from our predecessor or predecessors, his or their surrogate or surrogates, a pretended licence to execute the said office; and we article and object to you as before.

[Third. We article and object to you the said L. B., that by the laws, canons and constitutions of this realm, every parish clerk ought to be known of good conversation, and a man of good morals and decent behaviour, and particularly by the 91st canon of the canons and constitutions made and published in the year of our Lord 1603, it is therein provided especially, that every parish clerk be known to the vicar of the parish to be of honest conversation, and sufficient for his reading and writing, and also for his competent skill in singing; and we article and object to you as before.

[Fourth. We article and object to you the said L. B., that notwithstanding the premises aforesaid being true, you the said L. B., in defiance of the laws, canons and constitutions aforesaid, and in violation of the duty incumbent on your executing the office of parish clerk, have for several years last past behaved yourself in

(m) [For the power of the Ecclesiastical Courts to deprive a parish clerk, see that title in this volume, and the recent case of *Rex v. Neale*, 4 N. & Man. 868; and *Bowles v. Neale*, 7 C. & P. 262.]

the said office of parish clerk in a very indecent, unbecoming manner, and have been of a very loose and debauched conversation, have refused, or at least neglected, to do such duty as you ought; and that also you have been wanting of integrity, and have acted dishonestly in the said office of parish clerk and otherwise; and we article and object to you as before.

[Fifth. We article and object to you the said L. B., that on or about the — day of the month of —, in the year of our Lord —, or on some other day in the month of —, you the said L. B. behaved yourself in a most lewd and infamous manner in the ringing chamber of the parish church of L. aforesaid, and was then and there guilty of the foul crime of self-pollution; and this was and is true, public and notorious, and well known to W. W. and J. K. and others, and so much you the said L. B. have acknowledged and confessed to be true; and we article and object as before.

[Sixth. We article and object to you the said L. B., that there is a charitable benefaction of seven dozen of loaves to be distributed weekly during the season of Lent in every year to such poor children of the parish of L. as can answer a question in the catechism, and that you the said L. B., by virtue of your office aforesaid, received and had such bread under your custody, and that you have frequently purloined or embezzled great part of such bread, and converted the same to your own use, or at least by your connivance or notorious neglect, have suffered great part of the said bread to be purloined and embezzled and converted to other uses, in breach of your trust, and contrary to your duty and office, and to the very great prejudice of the said poor children and the charitable benefaction, and also to the discredit and detriment to the said parish of L.; and particularly in the month of —, in the year of our Lord —, during the season of Lent, you did so purloin or embezzle, or suffered to be purloined or embezzled, some of the said loaves of bread under your custody as aforesaid, and converted the same to your own use, or suffered the same to be converted to other uses, contrary to the intent and meaning of the said charitable benefaction and to your duty and trust, and against the consent of the minister, churchwardens and parishioners of the said parish; and we article and object to you as before.

[Seventh. We article and object to you the said L. B., that you have frequently used gross and abusive language, without cause, to the Reverend Mr. S. A., vicar of the said parish of L., and the present promoter of our office in this behalf, and particularly on or about the — day of —, in the year of our Lord —, and on several other days in the same month, and in other months in the same year, you the said L. B., without any just provocation, called the said Mr. A., your vicar, several scandalous and abusive names, or at least some one scandalous and abusive name, contrary to good manners and the duty of your office; and we article and object to you as before.

[Eighth. We article and object to you the said L. B., that contrary to your duty and office, and that which was incumbent on you, and due from you to the said Rev. Mr. A. your vicar, you

the said *L. B.* did attempt to defraud the said *Mr. A.*, your vicar, of his just dues, offerings, or dues received by you in the said office of parish clerk, for the use of the said *Mr. A.*; and that whilst the *Rev. W. H.* was curate to the said *Mr. A.*, as vicar of *L.* aforesaid, and within these six years last past, you did several times tamper with the *Rev. W. H.*, curate of the said parish, about sharing with him the extraordinary fees given voluntarily by persons at their marriages, over and above the common fees or offerings as a gratuity and mark of respect to and for the use of the said *Mr. A.*, at the same time telling him the said *Mr. H.* that you had done so with the former curate; and we article and object to you at any other time, &c. as before.

[Ninth. We article and object to you the said *L. B.*, that you are an habitual drunkard, and a person of a general bad character and immoral behaviour; and we article and object to you as before.

[Tenth. We article and object to you the said *L. B.*, that you have several times refused to attend, as was your duty, the *Rev. Mr. J. G.*, present curate of the said parish, with the surplice, in order to perform divine service, and particularly within these two years last past, you the said *L. B.* told the *Rev. Mr. J. G.* that you would not attend him with the surplice, for he was nothing but a poor curate; and we article and object to you as before.

[Eleventh. We article and object to you the said *L. B.*, that for these three or four years last past, you have not duly attended to your duty during the time of divine service, but have been negligent and remiss in the same, and particularly when it was your turn to read the alternate verse of the *Psalms* on Sundays and holydays, and at other times of public service in the church of *L.*, you have seldom or never read over or repeated the whole verse, but only spoke or read the first word or words, and the last word or words, and have not attended to say "Amen" at the minister's conclusion of each solemn prayer and thanksgiving, but either not said "Amen" at all, or said "Amen" at an improper time, to the hindrance and disturbance of the congregation in their devotion; and we article and object to you as before.

[Twelfth. We article and object to you the said *L. B.*, that on or about the — day of —, —, the said *Rev. Mr. A.*, the vicar aforesaid, did as far as by law he could or might, for your notorious offences aforesaid, and also at the particular request and desire of the parishioners of the said parish of *L.* in vestry assembled, remove and displace you the said *L. B.* from the office of parish clerk of *L.*, and discharged you from the execution thereof, and did nominate and appoint *E. G.*, a sober, honest and discreet person, and fully qualified to be parish clerk in your room and stead; and we article and object to you as before.

[Thirteenth. We article and object to you the said *L. B.*, that notwithstanding the premises, you did, on — before —, to wit, on the — day of —, —, come into the middle aisle of the parish church of *L.* aforesaid, with a mob of people, and set out a psalm in the midst of the service, and then and there sang and interrupted divine service; and we article and object to you as before.

[*Fourteenth.* We article and object to you the said *L. B.*, that the said *Rev. Mr. A.* hath been lawfully and canonically instituted or collated and inducted into the vicarage and parish church of *L.* aforesaid, and was as well before as at the time of his displacing you from the office of parish clerk of the said parish, and now is, the lawful vicar of the said parish of *L.*; and we article and object as before.

[*Fifteenth.* We article and object to you the said *L. B.*, that by reason of the premises aforesaid, the said *Rev. Mr. A.* hath prayed that we would revoke your licence heretofore granted, and that we would deprive or declare you the said *L. B.* deprived of the office of parish clerk of the said parish of *L.*, and hath desired our concurrence and approbation of his removal of you the said *L. B.* from the office of parish clerk of the said parish, and that we would approve of and confirm the nomination and appointment of the said *E. G.* as parish clerk of the said parish church in your room and stead, and that we would grant him our licence accordingly; and we article and object to you as before.

[*Sixteenth.* We article and object to you the said *L. B.*, that you were and are of the parish of *L.*, in the county and diocese of *L.*, and by reason thereof, and your having a licence for executing such office from our predecessor or predecessors, our or their surrogate or surrogates, and also by reason of all and singular the premises before set forth, you are notoriously subject to us and our jurisdiction; and we article and object to you as before.

[*Seventeenth.* We article and object to you the said *L. B.*, that all and singular the premises were and are true, public and notorious, and whereof there was and is a public voice, fame and report, of which legal proof being made, we will that right and justice be effectually administered, and that for such your crimes and offences your licence be by us and our authority revoked and declared null and void, and you be by us and our authority deprived or declared and decreed deprived of the said office of parish clerk of the said parish of *L.*, and justly discharged from the execution of the office of parish clerk, and that the nomination and appointment of the said *E. G.* as parish clerk in your stead, be by us and our authority confirmed, and our licence granted to the said *E. G.* accordingly, by the definitive sentence or final interlocutory decree which we shall read or interpose therein.

*Articles by a Party promoting a Suit for Nullity of Marriage
on the ground of Incest.*

[*In the Arches of Court of Canterbury.*

[*The office of the judge promoted by ——— }
against——, &c. &c.*]

[*In the name of God, Amen. We ———, Knight, Doctor of Laws, Official Principal of the Arches Court of Canterbury, lawfully constituted, to you D. S. and ——— respectively, of the parish of ———, in the county of ———, and diocese and province of Canterbury, all and singular the articles, heads, positions, or interrogatories hereunder*

written or hereinafter mentioned, touching and concerning the health of your souls and the lawful correction and reformation of your manners and excesses, and more especially for your having been guilty of the foul crime of incest, do by virtue of our office, at the voluntary promotion of — the surviving churchwarden of the said parish of —, object, administer, and article as follows, to wit.

[First. We article and object to you the said D. S. otherwise —, and —, falsely calling, &c. —, that in or about the twelfth day of January, in the year of our Lord one thousand seven hundred and sixty-eight, Richard —, being then a bachelor, or widower, and Elizabeth — of the same parish, being then a spinster, or widow, and both free from all matrimonial contracts and engagements, were lawfully joined together in holy matrimony according to the rites and ceremonies of the Church of England as by law established, in the parish church of — aforesaid, by the Reverend —, clerk, a priest or minister in holy orders of the Church of England, and then vicar of the said parish, who then and there pronounced them to be lawful husband and wife, in the presence and hearing of several credible witnesses, in virtue of banns of marriage thrice duly published in the said parish church, and an entry of such marriage was duly made in the register book of marriages kept in and for the said parish of —, for the said year one thousand seven hundred and sixty-eight. And this was and is true, public and notorious, and we article and object every thing in this and the subsequent articles contained jointly and severally.

[Second. Also that in supply of proof of part of the premises in the preceding articles mentioned, and to all other intents and purposes in the law whatsoever, we do exhibit, hereto annex, and will to be read and inserted, and taken as part and parcel hereof, a certain paper writing marked No. 1, and do article and allege the same to be and contain a true copy of the entry of the marriage of the said Richard — and Elizabeth — mentioned in the preceding article, that the same hath been faithfully extracted from the register book of marriages kept in and for the said parish of —, for the year one thousand seven hundred and sixty-eight, and carefully collated with its original now remaining therein and agrees therewith, that all and singular the contents of the said exhibit, and of the said original entry were and are true, that all things were so had and done as are therein contained, and that Richard — and Elizabeth — therein mentioned, and Richard — and Elizabeth —, his wife, who were the natural and lawful father and mother of you the said David —, otherwise —, and the lawful paternal grandfather and grandmother of you the said Elizabeth —, otherwise —, falsely calling yourself —, wife of the said David —, otherwise — (respectively deceased), were and are the same persons and not divers. And this was and is true, public and notorious, and we article and object as before.

[Third. Also we article and object to you the said David —, otherwise —, and Elizabeth —, otherwise —, otherwise —, spinster, falsely calling yourself —, wife of the said David —, otherwise —, that from and immediately after the said marriage of them the said Richard — and Elizabeth —, formerly —, in the preceding article mentioned, they lived and cohabited together as lawful husband and wife, in the said parish of —, and afterwards in the parish of —, in the county of —, and then in the parish of —, in the same county, and that during the time they

so lived and cohabited together in the said parish of —, they had issue of their said marriage a son named Richard —, who was the natural and lawful father of you the said Elizabeth —, otherwise —, otherwise —, spinster, falsely calling yourself —, wife of the said David, otherwise —, and that during the time the said Richard — and Elizabeth — so lived and cohabited together in the said parish of —, they had issue of their said marriage another son, being you the aforementioned David —, otherwise —; that the said — was born in or about the month of —, or the month of —, in the year one thousand seven hundred and seventy, and that on or about the twenty-fifth day of the said month of —, one thousand seven hundred and seventy, he was baptized in the parish church or parish of — aforesaid, as the natural and lawful son of the said Richard — and Elizabeth —, his wife, and that an entry of such baptism was duly made in the register book of baptisms kept for the said parish; and we further article and object to you the said David —, otherwise —, and Elizabeth —, otherwise —, spinster, falsely calling yourself —, wife of the said David —, otherwise —, that you the said David —, otherwise —, were born in or about the month of February, or —, in the year one thousand seven hundred and seventy-four, and that on or about the thirteenth day of the said month of —, one thousand seven hundred and seventy-four, you were baptized in the parish church or parish of — aforesaid, as the natural and lawful son of the said Richard — and Elizabeth —, by the name of —, and that an entry of such baptism was duly made in the register book of baptisms kept for the said parish of —; and further that the said Richard — and Elizabeth —, his wife, upon all occasions owned and acknowledged the said Richard —, (who was the natural and lawful father of you the said Elizabeth —, otherwise —, spinster,) and you the said David —, otherwise —, to be their natural and lawful children, and that the said Richard —, (who was the natural and lawful father of you the said Elizabeth —, otherwise —, spinster,) and you the said David —, otherwise —, upon all occasions constantly owned and acknowledged each other to be his and your natural and lawful brother, and the said Richard — and Elizabeth —, his wife, to be his and your (the said David —, otherwise —) natural and lawful father and mother, and that for and as persons so respectively related to each other the said Richard — and Elizabeth —, his wife, and the said Richard —, (the natural and lawful father of you the said Elizabeth —, otherwise —, spinster,) and you the said David —, otherwise —, were and are commonly accounted, reputed, and taken to be by and amongst their and your relations, friends, acquaintance, and others. And this was and is true, public and notorious, and we article and object as before.

[Fourth. Also that in supply of proof of the premises in the next preceding article mentioned, and to all other intents and purposes in the law whatsoever, we do exhibit and hereto annex, and will to be here read and inserted, and taken as part and parcel hereof, two paper writings marked respectively No. 2 and No. 3, and do article, object, and allege the said paper writing marked No. 2 to be a true copy of the entry of the baptism of the said Richard —, the natural and lawful father of you the said Elizabeth —, otherwise —, spinster, that the same hath been faithfully extracted from the register book of baptisms kept in

and for the said parish of —, in the county of —, for the year one thousand seven hundred and seventy, and carefully collated with its original now remaining therein, and agrees therewith, and the said paper writing marked No. 3 to be a true copy of the entry of the baptism of you the said David —, otherwise —, that the same hath been faithfully extracted from the register book of baptisms kept in and for the said parish of —, in the county of —, for the year one thousand seven hundred and seventy-four, and carefully collated with its original now remaining therein, and agrees therewith, that all things were so had and done as are in the said exhibits respectively contained, and that "Richard" mentioned in the said exhibit, marked No. 2, as the "son of Elizabeth and Richard —;" and Richard — the natural and lawful father of you the said Elizabeth —, otherwise —, spinster, and the natural and lawful brother of you the said —, otherwise —, were and are one and the same person and not divers; and that "David" mentioned in the said exhibit marked No. 3, as the "son of Richard and Elizabeth —," and who was afterwards incestuously married to you the said Elizabeth —, otherwise —, spinster, as hereinafter pleaded, and you the said David —, otherwise —, were and are one and the same person and not divers, and that "Richard and Elizabeth —," mentioned in the said exhibit marked No. 2, and "Richard and Elizabeth —" mentioned in the said exhibit marked No. 3, and Richard — and Elizabeth —, formerly —, his wife, mentioned in the aforesaid first and second articles, and Richard — and Elizabeth —, the natural and lawful father and mother of you the said David —, otherwise —, and the lawful and paternal grandfather and grandmother of you the said Elizabeth —, otherwise —, spinster, were and are the same persons and not divers. And this was and is true, public and notorious, and we article and object as before.

[Fifth. Also we article and object to you the said David —, otherwise —, and Elizabeth —, otherwise —, spinster, falsely calling yourself —, wife of the said David —, otherwise —, that on or about the ninth day of October, in the year —, the said Richard —, the natural and lawful son of the said Richard — and Elizabeth —, his wife, and the natural and lawful father of you the said Elizabeth —, otherwise —, spinster, being then a bachelor and residing in the aforesaid parish of —, and Sarah —, of the parish of —, in the said county of —, being then a spinster or widow, and both free from all matrimonial contracts and engagements, were lawfully joined together in holy matrimony according to the rites and ceremonies of the Church of England as by law established, in the parish church of — aforesaid, by the Reverend —, clerk, a priest or minister in holy orders of the Church of England, and then curate of the said parish, who then and there pronounced them to be lawful husband and wife in the presence and hearing of several credible witnesses, in virtue of banns thrice duly published in the said parish church, and an entry of such marriage was duly made in the register book of marriages kept for the said parish of —, for the said year —. And this was, &c. &c.

[Sixth. Also that in supply of proof of part of the premises in the next preceding article mentioned, and to all other intents and purposes in the law whatsoever, we do exhibit, hereto annex, and will to be here read and inserted, and taken as part and parcel hereof, a certain

paper writing marked No. 4, and do article, object, and allege the same to be and contain a true copy of the entry of the marriage of the said Richard — and Sarah — mentioned in the next preceding article, that the same hath been faithfully extracted from the register book of marriages kept for the said parish of —, for the year 1791, and carefully collated with its original now remaining therein, and agrees therewith; that all and singular the contents of the said exhibit and of the said original entry were and are true, that all things were so had and done as are therein contained, and that Richard — and Sarah — therein mentioned, and Richard — and Sarah —, formerly —, his wife, the natural and lawful father and mother of you the said Elizabeth —, otherwise —, spinster, were and are the same persons and not divers; and that Richard — therein mentioned and Richard — mentioned in the third and fourth preceding articles, the natural and lawful brother of you the said David —, otherwise —, were and are one and the same person and not divers. And this was, &c.

[Seventh. Also we article and object to you the said David —, otherwise —, and Elizabeth —, otherwise —, spinster, falsely calling yourself —, and wife of David —, otherwise —, that from and immediately after the said marriage of them the said Richard — and Sarah —, formerly —, in the two next preceding articles mentioned, they lived and cohabited together as lawful husband and wife, as well in the said parishes of — and —, as also in the parish of —, in the county of —, and that during the time they so lived and cohabited together they had issue of their said marriage a daughter, being you the said Elizabeth —, otherwise —, spinster; and we article and object that you the said Elizabeth —, otherwise —, spinster, were born on or about the 21st December in the year —, and that on or about the eighth day of the month of March, —, you were baptized in the parish church or parish of — aforesaid, as the natural and lawful daughter of the said Richard — and Sarah —, formerly —, his wife, and an entry of such baptism was duly made in the register book of baptisms kept for the said parish of —, for the said year —, but that in such entry by error the christian name of the said Sarah — was written "Elizabeth," and the surname of the said Richard — and Sarah — was written —; and we further article and object to you the said David —, otherwise —, and Elizabeth —, otherwise —, spinster, that the said Richard — and Sarah —, upon all occasions owned and acknowledged you the said Elizabeth —, otherwise —, spinster, to be their natural and lawful daughter; and that you the said Elizabeth —, otherwise —, spinster, upon all occasions constantly owned and acknowledged the said Richard — and Sarah —, his wife, to be your natural father and mother, and that for and as persons so related to each other the said Richard — and Sarah —, his wife, and you the said Elizabeth —, otherwise —, spinster, were and are commonly accounted and taken to be by and amongst your relations, friends, acquaintance and others. And this was, &c. &c.

[Eighth. Also that in part supply of proof of the premises mentioned in the next preceding article, and to all other intents and purposes in the law whatsoever, we do exhibit, hereto annex, and will to be here read

and inserted, and taken as part and parcel hereof, a certain paper writing marked No. 5, and do article and object, and allege the same to be a true copy of the entry of the baptism of you the said Elizabeth —, otherwise —, spinster, mentioned in the next preceding article, that the same hath been faithfully extracted from the register book of baptisms kept for the said parish of —, in the county of —, for the year one thousand seven hundred and ninety-two, and carefully collated with its original now remaining therein and agrees therewith, that all and singular the contents of the said exhibit and the said original entry were and are true, that all things were so had and done as therein contained, and that "Elizabeth" therein mentioned as the daughter of "Richard and Elizabeth —," and you the said Elizabeth —, otherwise —, spinster, were and are one and the same person and not divers; and that Richard — and Elizabeth — therein mentioned, and Richard — and Sarah —, formerly —, his wife, mentioned in the sixth and seventh preceding articles, the natural and lawful father and mother of you the said Elizabeth —, otherwise —, spinster, were and are the same person and not divers. And this was and is, &c.

[Ninth. Also we article and object to you, the said David —, otherwise —, and Elizabeth —, otherwise —, spinster, falsely calling yourself —, wife of the said David —; that the marriage of a man with his brother's daughter, and the marriage of a woman with her father's brother, is prohibited by the law of God, and that in and by the table of degrees of marriage set forth by the Reverend Father in God, Matthew Parker, by divine providence some time Lord Archbishop of Canterbury, Primate of all England and Metropolitan, in the year of our Lord 1563, it is declared, ordered and directed, that a man may not marry his brother's daughter, and that a woman may not marry her father's brother; and that by the 99th canon of the constitutions and canons ecclesiastical, treated of by the Bishop of London, president of the convocation for the province of Canterbury, and the rest of the bishops and clergy of the said province, and agreed upon with the king's majesty's licence in their synod, begun at London in the year of our Lord 1603, it is declared, ordered and directed, that no person shall marry within the degrees prohibited by the laws of God, and expressed in a table set forth by authority in the year 1563, and that all marriages so made and contracted shall be judged incestuous and unlawful, and consequently shall be dissolved, as void from the beginning, and the parties shall by course of law be separated as in and by the said table and canon to which we refer doth appear. And this was and is, &c.]

[Tenth. Also we article and object to you, the said David —, otherwise —, and Elizabeth —, otherwise F. —, spinster, falsely calling yourself —, wife of the said David —, otherwise —, that notwithstanding the premises pleaded, objected and alleged in the several preceding articles were and are true, you the said David —, otherwise —, being then a widower, did pay your courtship and addresses in the way of marriage to your niece, the said Elizabeth —, otherwise —, spinster, the natural and lawful daughter of Richard —, the natural and lawful brother of you, the said David —, otherwise —; and that you the said Elizabeth —, otherwise —, was then a spinster, and did receive the courtship and addresses in the way of marriage of your uncle, the said David —, otherwise —, the natural and lawful brother of the said Richard —, the

natural and lawful father of you, the said Elizabeth —, otherwise —, spinster, and did consent to be married to him, and that accordingly on or about the 24th day of May, in the year —, a marriage was in fact had and solemnized, or rather profaned, between you the said David —, otherwise —, and you the said Elizabeth —, otherwise —, spinster, then passing in the name of —, in the parish church of Saint —, in the county of —, by the reverend —, priest or minister in holy orders of the Church of England, or officiating as such, in the presence and hearing of several credible persons, by virtue of banns of marriage thrice duly published in the said church; and an entry of such marriage was made in the registry book of marriages kept for the said parish for the said year. And this was and is, &c.

[Eleventh. Also that in part supply of proof of the premises mentioned in the next preceding article, and to all other intents and purposes in the law whatsoever, we do exhibit, hereto annex and will to be here read and inserted and taken as part and parcel hereof, a certain paper writing marked No. 6, and article, object and allege the same to be and contain a true copy of the entry of the marriage of you the said David —, otherwise —, and Elizabeth —, otherwise —, spinster, mentioned in the next preceding article, that the same hath been faithfully extracted from the register book of marriages kept for the said parish of St. Margaret, next —, in the county of —, for the year —, are carefully collated and examined with its original now remaining therein, and agrees therewith, that all and singular the contents of the said exhibit, and of the said original entry, were and are true, that all things were so had and done and therein contained, and that David —, and Elizabeth —, therein mentioned, and you the said David —, otherwise —, and you the said Elizabeth —, otherwise —, spinster, falsely calling yourself —, wife of the said David —, otherwise —, the parties accused and complained of in this cause, were and are the same persons, and not divers. And this was and is, &c.

[Twelfth. Also we article and object to you the said David —, otherwise —, and Elizabeth —, otherwise —, spinster, falsely calling yourself — wife of the said David —, otherwise —, that immediately after the marriage mentioned in the tenth of these articles was solemnized, or rather profaned, you the said David —, otherwise —, and Elizabeth —, otherwise —, spinster, lived and cohabited together as husband and wife in the said parish of St. — next —, in the county of —, and afterwards in the parishes of — and —, and in the parish of —, in the county of —, and did consummate the said marriage, or rather effigy or show of marriage, by carnal copulation and procreation of children, (several of whom are now living,) and have ever since continued to live, and do now continue to live and cohabit together in an incestuous manner, pretending to be husband and wife. And this was and is, &c.

[Thirteenth. Also we article and object to you the said David —, otherwise —, and Elizabeth —, otherwise —, spinster, falsely calling yourself —, and wife of the said David —, otherwise —, that you were and are of the parish of —, in the county of —, and diocese and province of Canterbury, and therefore and by reason of the premises and letters of request under the hand and seal of the Worshipful

—, Knight, Doctor of Laws, Commissary-General of the Most Reverend Father in God, —, by divine providence Archbishop of Canterbury, Primate of all England and Metropolitan, in and throughout the whole city and diocese of Canterbury lawfully constituted, to us presented and by us accepted in this cause, and also by reason of our office being promoted by the aforesaid Richard —, you were and are subject to the jurisdiction of this Court. And this was and is, &c.

[Fourteenth. Also we article and object to you, the said David —, otherwise —, and Elizabeth —, otherwise —, spinster, falsely calling yourself —, wife of the said David —, otherwise —, that of and concerning all and singular the premises, it has been and is, by and on the part and behalf of the said Richard —, the promoter in the cause, rightly and duly complained to us and to this Court. And we article and object as before.

[Fifteenth. Also we article and object to you the said David —, otherwise —, and Elizabeth —, otherwise —, spinster, falsely calling yourself —, wife of the said David —, otherwise —, that all and singular the premises were and are true, public and notorious; and thereof there was and is a public voice, fame and report, of which legal proof being made, we will that right and justice shall be effectually done and administered in the premises, and that the aforesaid pretended marriage, or rather effigy or show of marriage so unduly had and solemnized, or rather profaned, between you the said David —, otherwise —, and Elizabeth —, otherwise —, spinster, may be dissolved, and pronounced and declared to have been and to be absolutely null and void from the beginning, to all intents and purposes in the law whatsoever, by reason of incest, pursuant and agreeably to the aforesaid 99th canon, and that you shall be duly corrected and punished according to law for your excess and temerity in the premises, and condemned in the costs of this suit made and to be made on the part and behalf of the said —, the promoter, and compelled to the due payment thereof by the definitive sentence or final decree to be read or promulged, or made and interposed in this cause.—ED.]

5. Personal Answer.

When brought in.

When not.

Their Object.

After (*k*) contestation of suit (*l*), the next thing which follows in course of practice, if a suit proceeds, is the demanding and giving in of personal answers, unless it be in a criminal cause, wherein no one is bound to accuse himself: these are made in writing to the several articles or positions of a libel, or to any other judicial matter exhibited in court, and ought to be expressed in very clear and certain terms; and upon the oath also of the person that exhibits them.

For personal answers are therefore provided in law, that by the help of them, the adverse party may be relieved in the matter of proof. And if these answers are not clear, full and

(*k*) [See Rule 9 of Orders of Court, ante.]

(*l*) [Formerly also the oath of calumny was taken by both litigants. See title Oaths, in this volume. See

tit. Cod. De jurejur. propt. calumn. dando, p. 16, ii. 59; Nov. 49, c. 3; Nov. 124, c. 1; Decret. (ii. 7), and lib. vi. (ii. 4, De jur. calumn.)]

certain, they are deemed and taken in law as not given at all: and upon a motion made, the judge ought to enjoin new answers; it being the same thing to give no answer at all, as to give a general and insufficient answer (*m*).

A personal answer, therefore, ought to have these three qualities in it; first, it ought to be pertinent to the matter in hand. Secondly, it ought to be absolute and unconditional. And, thirdly, it ought to be clear and certain (*n*).

What they
should con-
tain.

[In answers, a party, first, is bound only to answer in facts, not to his own motives, nor to his belief of the motives of another person: and, secondly, where the plea avers ignorance of the real nature of a transaction by a party to such transaction and to the suit, the other party is, in his answers to such plea, allowed to state facts inferring full knowledge thereof, and acquiescence therein. A party is not bound to answer when his answer would criminate himself, nor, it should seem, when it would tend to degrade him (*o*).

[Personal answers are not confined to being mere echoes of the plea accompanied with simple affirmances or denials, but the respondents are further at liberty to enter into all such matter as may *fairly* be deemed not more than sufficient to place the transactions, as to which their answers are, in what they insist to be the true and proper light (*p*). If the answers of a party are not brought in at the time assigned by the court, the facts pleaded are taken *pro confesso*, and the expense of taking depositions to prove facts confessed in answers, is paid by the party producing the witnesses (*q*). It is a maxim of the law administered in the Ecclesiastical Courts, that whatever is to be done *personally* by the party principal in the cause, requires, in strictness, a personal service of the notice or decree for doing it upon the party principal, and it has therefore been held that a service of a decree for answers upon the *proctor* will not justify the court in putting the principal party in contempt, if these answers are not brought in. This was laid down as law by Sir John Nicholl, in his judgment in *Durant v. Durant* (*r*), during the course of which he entered into the following accurate and elaborate history of this branch of the suit.

Require a
Personal Ser-
vice.

[“From the old practice (*s*), then, as laid down by Oughton, Clerk, and Consett, it is to be collected that personal answers *were* twofold—being to be had, in certain causes, on special application, from the proctor in the cause, as well as from the

Old Practice
with respect
to.

(*m*) “Nihil interest neget quis an taceat interrogatus, an obscure respondeat, ut incertum demittat interrogatorem (Dig. ii. i. 117.),” [is the language of the Roman law upon this subject.]

(*n*) Ayl. Parerg. 65.

(*o*) [*Swift v. Swift*, 4 Hagg. 139.]

(*p*) [See the whole judgment of Sir J. Nicholl, in *Oliver and Puke v. Heathcote*, 2 Add. 35.]

(*q*) [*Vide ante*, 9 and 10 of Orders of Court of 14th Feb. 1830.]

(*r*) [1 Add. 114, 118, &c.]

(*s*) [*Ibid.* 118.]

Old Practice
with respect
to.

principal. This is distinctly laid down by Oughton; for instance, in the 16th section of his 61st title, '*De litis contestatione*,' and in the subsequent section [s. 17 of the same title], the suits, in special, where the proctor's answers may be had, are pointed out, and the uses to which they are capable of being made subservient in these suits, are ascertained. Now this being so, I apprehend that notices or decrees for personal answers were always served accordingly; that is, notices for such answers from the proctor, upon the proctor; and decrees for such answers from the party, upon the party.

["It is true indeed that Oughton, in his 62nd title, refers to a note on title xxi. [Obs. 9.] by which it seems, that a decree for the answers of the party principal in the cause *may be* served on his proctor. But this can only be, he observes, under the special authority of the court, in virtue of a special clause inserted in the decree itself; and consequently it forms no exception to the rule, that in ordinary cases, the decree for the personal answers of the party principal must be personally served upon the party principal. Oughton's whole 62nd title represents, under ordinary circumstances, the decree for the personal answers of the party principal, as a formal process, under seal of the court, against the party principal, and required to be served, personally, upon the party, as contradistinguished from any mere assignation or notice to be served upon the proctor. And this I conceive to have been invariably the old practice, except as excepted in the 9th obs. on Oughton's 21st title—an exception not at all applicable to the case of the present appeal, or in ordinary instances.

Why a Personal Service
is requisite.

["So stood the old practice, a practice, I must also remark, both perfectly reasonable in itself, and perfectly consonant with the practice of the court in analogous cases. For the reasonableness of the practice, it is too obvious to be insisted upon; and for its consonance with analogy, we all know, that whatever is to be done, personally, by the party, absolutely requires, in strictness, a personal service of the notice or decree for doing it upon the party. Where steps are to be taken by the proctor merely, a mere assignation upon the proctor suffices—he, *quoad hæc*, being '*dominus litis*.' But where the personal intervention of the principal is requisite to the act to be done, as it is, for instance, where costs are taxed against him, or where sums are decreed to be paid by him on account of alimony, the practice is to take out a monition against the party, not merely to serve a notice on the proctor, which monition must be personally served upon the party; in all cases, that is, where it is requisite that the proceedings should be conducted with any semblance of regularity.

Modern Practice of Service on Proctor incorrect.

["It must be conceded, however, in this matter of *personal answers*, that the modern practice has been to serve the decree on the proctor only, and not on the principal. This may have

arisen, partly perhaps from the two species of personal answers already alluded to (the latter, for obvious reasons, now obsolete) being confounded in modern practice; and, partly, because persons seldom hang back in this matter of *answers*, which are to be obtained, in most cases, without any sort of difficulty. *Being* the practice, however, I should be disposed to admit, that a service of the decree for answers, though merely upon the proctor, might be a sufficient service of the decree for very many purposes. For instance, if, after such service, the party's answer to an allegation of faculties were not brought in within a fit and reasonable time, it might justify the court in allotting sums on account of alimony (the marriage, that is, being proved or confessed) in proportion to the full extent of the faculties alleged; and so on. But it is a very different question whether such a service would justify the court in putting the party in contempt, and proceeding to signify him, in order to his imprisonment, under the statute; a measure which, I conceive, ecclesiastical courts to be only warranted in adopting, where the prior proceedings have been conducted with the strictest regularity.

How far
available.

[“Nor would it vary the case, in this view of it, to my apprehension, that *notice* of the decree should have been served on the principal, or that the proctor should have *appeared* to the decree, and prayed further time, and so forth; both which circumstances occurred in this very suit. As for the notice, that was a mere notice from the adverse proctor; the only notice which the party was bound (under *this* penalty at least) to obey, being the decree of the court, under seal of the court, *duly*, i. e. personally, served upon him, the party. As for the proctor's appearing to, and acting upon the decree, I can by no means think the act of the proctor *so* binding on the principal—unless, indeed, in virtue of some special clause to the effect of enabling him to accept services of decrees, &c. upon the principal, inserted in the proxy—for I cannot concede that a party may be put in contempt, and signified so as to become liable to all the penalties of contumacy, merely from his proctor doing that, for doing which he has no strict legal authority.

Necessity of
Personal Ser-
vice.

[“Such then being the old practice, and being so, as it is, consonant both to reason and analogy, it remains only to inquire whether it has undergone any authoritative alteration in later times. Nor do I conceive that the inquiry can be attended with any sort of difficulty. Is there any adjudged case producible where this court has proceeded to enforce decrees of this nature by its compulsory process, in the absence of a personal service? I am confident there are none. Can it even be shown that such decrees have been so enforced, unless after a personal service, the whole matter passing *sub silentio*? I am nearly as confident that *this* has not occurred;

for the court is always (or means to be) satisfied that there has been a personal service before issuing its compulsory process in this description of cases. The result therefore of the whole inquiry, which is almost too obvious to be stated in terms, is, that the old practice in this matter of personal answers, being both perfectly reasonable, and perfectly analogous to the correct practice in similar cases, should and *must*, in all cases, *stricti juris*, be the practice of ecclesiastical courts at this very day."

Ancient Practice.

[It seems that the ancient practice was to give acts or petitions exceptive to answers, but never on allegation (s).

Where Answers can and can not be claimed.

[Answers cannot be claimed where they would subject the party making them to a prosecution for a felony (t). In criminal suits the defendant's answers upon oath are not to be required even to those positions which are not in themselves criminatory. The law upon this point is fully and carefully set forth by Sir J. Nicholl, in the case of *Schultes v. Hodgson* (u). It is a common error of country courts to consider personal answers as responsive allegations, and to examine witnesses, an error which arises from a confusion of the answers with the plea (x). The obvious use and advantage of answers is to save the necessity of taking evidence (y), and causes are sometimes decided upon them alone (z).

Reformation of.

[Answers may be directed to be reformed. Instances are to be found in the Reports where they have been so on the several scores of redundancy (a), for containing abusive matter (b), for irrelevancy (c); and an assignation for fuller answers has sometimes been decreed after publication (d). When a certificate to a decree for answers has been discontinued, it is still competent to the proctor having discontinued it, to object to answers (e). Time has been allowed to an agent acting under a power of attorney to plead on an answer in an interest cause, when the principal resided in Jamaica (f), but a party not giving in his answers on the day of the return of the decree, *personally* served, will be pronounced contumacious (g).

Consequence of not giving.

- | | |
|---|---|
| (s) [<i>Morgan v. Hopkins</i> , 2 Phill. 585.] | <i>Mayo v. Brown</i> , <i>ibid.</i> 570.] |
| (t) [<i>Robins v. Wolseley</i> , 1 Lee, 620.] | (b) [<i>Raymond v. Baron de Watteville</i> , 2 Lee, 499.] |
| (u) [1 Add. 105.] | (c) [<i>Ibid.</i> ; and see 2 Lee, 568, <i>contra.</i>] |
| (x) [<i>Burnell v. Jenkins</i> , 2 Phill. 394; <i>Morgan v. Hopkins</i> , 2 Phill. 584.] | (d) [<i>Smith v. Smithson</i> , 2 Lee, 505; <i>Heath v. Heath</i> , 2 Lee, 562.] |
| (y) [<i>Clutton v. Cherry</i> , 2 Phill. 385.] | (e) [<i>Raymond v. Baron de Watteville</i> , 2 Lee, 495.] |
| (z) [<i>Wright v. Sarmuda</i> , 2 Phill. 266 n.; <i>Clark v. Douce</i> , 2 Phill. 335; <i>Morgan v. Hopkins</i> , 2 Phill. 582.] | (f) [<i>Liebenrood v. Lawson</i> , 2 Lee, 558.] |
| (a) [<i>Jehen v. Jehen</i> , 1 Lee, 273 ; | (g) [<i>Wyllie v. Mott and French</i> , 1 Hagg. 33, and see note.] |

[Form of Personal Answers.

[The answers of J. P., Esq. to the first allegation (dated —), given on behalf of Sir M. W. and others.

[First. To the first position or article of the said allegation, this respondent, answering, saith: he believes, and therefore admits, that the said J. W., the testator in this cause, being of sound mind, memory and understanding, and having a mind and intention to make his will, did give directions and instructions for the drawing thereof; and that pursuant thereto, the paper-writing marked (A), headed "Instructions for the Will of me, James Wood," was drawn up and reduced into writing; and that the said deceased, as this respondent believes, and therefore admits, did, in testimony of his liking and approbation thereof, to wit, on or about the — day of —, in the year of our Lord —, being the day of the date thereof, set and subscribe his name thereto; and this respondent, further answering, saith, that on the following day, to wit, the — day of —, in the year of our Lord —, the said J. W., the testator in this cause, being then also of sound mind, memory and understanding, and having a mind and intention to complete his said will, did give directions and instructions for, and pursuant thereto, the paper-writing marked (B), beginning thus, "I, J. W., Esq., do declare this to be my will," ending thus, "In witness whereof, I have to this, my last will, set my hand this —," and thus subscribed, "J. W.," was drawn up and reduced into writing; and that, after the same was drawn up and reduced into writing, to wit, on or about the — day of —, in the year of our Lord —, being the day of the date thereof, he, the said deceased, did, in testimony of his liking and approbation thereof, as this respondent verily believes, and therefore admits, set and subscribe his name thereto, and publish and declare the same as and for his will, in the presence of the three credible witnesses, whose names are thereto subscribed as attesting the execution thereof; and that the said deceased did do, in all things, as in his said will is contained in the said two paper-writings, marked (A) and (B); and that he, the said deceased, was, at and during all and singular the premises, of sound, perfect and disposing mind, memory and understanding, and well knew and understood what he then said and did, and what was said and done in his presence, and was fully capable of giving instructions for, and of making and executing his said will, or of doing any other serious or rational act of that or the like nature, requiring thought, judgment or reflection. And further or otherwise, this respondent knoweth not of his own knowledge or belief to answer to the said article.

[Second. To the second position or article of the said allegation, this respondent, answering, saith, that he believes, and therefore admits and confesses, that the names "J. W." set and subscribed to the said paper-writings, marked (A) and (B), are of the proper hand-writing and subscription of the said J. W., the deceased, in this cause. And this respondent, further answering, saith, that he was a confidential friend of the said deceased, who died on the — day of —, in the present year of our Lord —; and as such, he did, on the day following, search among the deceased's papers of moment and concern, and found in a private drawer of a bureau, which was locked in a closet adjoining the bedroom in which he, the said deceased, died, the

said paper-writings marked (A) and (B), sealed up in a certain envelope (now remaining in the registry of this court, annexed to an affidavit heretofore duly made and sworn to by this respondent, and marked with the letter (C), and indorsed "The will of J. W., Esq., —.") And further or otherwise, to the said articles, this respondent knows not to answer.

[Third. To the third position or article of the said allegation, this respondent, answering, saith, that he believes and admits what he hath before admitted, and disbelieves and denies what he hath before denied.

—, —, —,
Repeated and acknowledged before Dr. C., Surr.

J. P.

In the presence of C. D., Not. Pub.]

6. Evidence.

One Witness,
how far Evi-
dence.

A single witness is not sufficient in the civil law, and the spiritual court will not allow of one witness only, but there must be two witnesses at the least; and if the point is merely spiritual, the temporal courts will not grant a prohibition (*h*).

The canonists have borrowed this, as they have most of their rules of evidence, from the civil law, which does not permit a single witness to be heard. *Unius testis responsio non audiat etiamsi præclaræ curiæ honore præfulgeat* (*i*). A cause therefore which rested on the testimony of a single witness, uncorroborated by any other evidence, was to be dismissed without tendering the suppletory oath (*k*). But a complete proof might be adduced without any witness, by deeds or instruments; and the evidence of one witness corroborated by circumstances, or circumstances without a witness, furnish conclusive proof in crimes as well as civil actions (*l*).

[The general rule of evidence appears to be common to the civil law and to the law of England; for the language of Gaill is (*m*), "the law is contented with such proof as *can* be made if the subject *in its nature* is difficult of proof (*n*); and

(*h*) Gibs. 1011 [*Chadron v. Harris*, Noy's R. 12; Vin. Abr. Prohib. (Q.) 7.]

(*i*) Cod. 4. 20. 9; Dig. 22. 5. 12.

(*k*) Noodt. ad Dig. 22. 5. ["Non jus deficit sed probatio," is the not inelegant language of civilians.—Ed.]

(*l*) See Huber ad Dig. de Testibus and Matheus de Criminibus, cap. De Probationibus. [See principally, Dig. L. xxii. 3, 4, 5, De probationibus, præsumptionibus et testibus.—Cod. iv. 19, 20, on the same subjects. The canon law added little to the maxims of the civil law on this head; c. 3. x. De testibus, 11, 21.] This title is most important in law, but to discuss it with accuracy would swell this volume

beyond its proper limits; the reader must therefore consult for the rules of the civil and canon law, the interpreters on the titles of the Digest and Code above cited, together with Inst. J. C. 3. 14; and for the English Law, Gilbert's Law of Evidence, Buller's Law of Nisi Prius, Espinasse's ditto; the Abridgments (particularly Viner's) tit. Evidence; 2 Hawk. P. C. ch. 46; Treatise of Equity, edited by Mr. Fonblanque, vol. ii. p. 447; and the Reports of Decisions at Nisi Prius; [and the Treatises of Messrs. Starkie and Phillipps.]

(*m*) [Lib. 2, obs. 149.]

(*n*) [Lib. 2, obs. 91, s. 7.]

again, “*probationum facultas non angustiori sed ampliori debet*; and so Lord Hardwicke observes, in *Omichund v. Barker* (o), “the judges and the sages of the law have laid it down that there is but *one general rule of evidence*—the best that the nature of the case will admit.” Mr. Burke, in his Report of the Committee on the Question of Evidence in *Warren Hastings’ trial* (p), remarks, “Courts (*i. e.* of common law) in England do not judge upon evidence *secundum allegata et probata*, as in other countries and under other laws (*viz.* of the Ecclesiastical Courts) they do, but upon verdict. By a fiction of law, they consider the jury as supplying in some sense the place of testimony. One witness (and for that reason) is allowed sufficient to convict in cases of felony, which in other laws is not permitted (q).”

[It has been repeatedly laid down by eminent authorities, amongst whom may be numbered Sir George Hay, Lord Camden, Lord Mansfield, and Sir George Lee (r), that where the law of England is silent, the civil as well as the canon law (s) is the basis and text law of our ecclesiastical courts. Constant reference to that code will be found in the judgments of Lord Stowell. In the case of *Moore v. Moore and Metcalfe*, argued before the Delegates, the question whether the mutilation of a will should be held to amount to a cancellation, seems to have been mainly decided by a reference to the doctrine of the civil law upon the subject (t). So also the Commissioners for inquiring into the Practice and Jurisdiction of the Ecclesiastical Courts, observe in their Report made to the House of Commons in 1832, “The advocates and proctors of the Court of Arches are entitled to practise in the other Ecclesiastical Courts, and in the High Court of Admiralty, upon being admitted by the judge thereof. This connexion between the ecclesiastical and admiralty jurisdictions has long subsisted, and probably owes its origin to the similarity of the form of proceedings in both courts, and of the course of study necessary to qualify the practitioners for the proper discharge of the duties entrusted to them. The study of the ecclesiastical law requires an accurate acquaintance with the principles of the civil law, upon which the law of the admiralty is founded; and the civilian is led to the investigation of those principles of general

Civil Law
Basis of the
Law of the
Ecclesiastical
Courts.

(o) [1 Atk.]

(p) [See vol. xiv. 8vo. ed. p. 355, Debates on Evidence, Rep. from Com. to inspect Lords’ Journals. It is probable that Dr. Lawrence (one of Mr. Burke’s coadjutors in this trial) furnished the information on the evidence of the civil and canon law.—ED.]

(q) [“In re criminali probationes debent esse evidentes et luce meri-

dianâ clariores,” is the maxim of the older civilians.]

(r) [See also *Moore v. Payne*, 2 Lee, 595, and the authorities collected in Dr. Phillimore’s speech in *Moore v. Moore and Metcalfe*, 1 Phill. 434.]

(s) [Where the ecclesiastical law speaks, the civil law is silent, says Swinburne, vol. i. pt. i.]

(t) [See Mr. Justice Abbott’s remarks, 1 Phill. 437.]

Civil Law
Basis of the
Law of the
Ecclesiastical
Courts.

jurisprudence by which the intercourse of nations is governed, and the rights and obligations of belligerent and neutrals in time of war are defined." And in the case of *The Ville de Varsovie*, in the Court of Admiralty, where an objection was taken to the competency of Lord Cochrane to appear as a witness, Lord Stowell remarked, "The objection must be considered on the authority of the law of *England*. The question, it is true, arises in a cause, and likewise in a court, which are both governed by another system, but it arises incidentally in a case that concerns British subjects only, on a mere dispute of property between them, and, if determined in one manner, deeply affecting the civil condition and capacity of one of them; upon all these considerations it is the duty of the court to look only to the law of England as its proper guide, *although it does not administer that law generally, and therefore does not profess to understand it otherwise than by the information it collects pro re natâ*, and with the diffidence that naturally belongs to partial views and an imperfect knowledge of the general system (u)."—ED.]

For where the ecclesiastical court doth proceed in a matter that is merely spiritual, and pertinent to their court, according to the civil law, although their proceedings are against the rules of the common law, yet a prohibition doth not lie; as if they refuse a single witness to prove a will, for the cognizance of that belongs to them (x). [And the court of appeal shall be bound to follow the law of civilians (y).—ED.]

One Witness
how far Evi-
dence.

Which same thing was affirmed in *Roberts's case* (z), H., 8 Jac. 1, with regard to points not otherwise cognizable in the spiritual courts, than as incidental to the principal point. There the suit was for subtraction of tithes, and prohibition was obtained, because there was but one witness to prove the lease of the tithes, and the spiritual court would not allow the proof. And upon advisement in this case, by Coke and all the justices, it was resolved, that consultation should be awarded, because there is a rule in the register, that where the cognizance of the principal is, there the cognizance of the accessory necessarily follows; and if such surmise should be allowed in every case, it would oftentimes be made for mere delay, and the spiritual court should not try the accessory as well as principal: and the conclusion is, when the original cause belongs unto them, although matter triable at the common law ariseth, depending upon the original cause, yet it shall be determined by the ecclesiastical court; and such surmise, that he had but one witness, is not sufficient to have a prohibition, where the ecclesiastical court hath jurisdiction of the principal; for if such a surmise should be sufficient, all suits in the ecclesiastical court should

(u) [Lord Stowell was at this time Judge of the High Court of Admiralty and of the Consistory of London.]

(x) God. Rep. 115.

(y) [*Thwaites v. Smith*, 1 P. Wms. 40.]

(z) Cro. Jac. 269; 12 Co. 65.

thereby be stayed or otherwise taken away, for the ecclesiastical judges cannot write to the temporal judges to try it, and certify, as the temporal judges, where the original matter belongs to and is commenced in their courts, and issue is taken upon matter triable by the ecclesiastical law, may write to the judges of the ecclesiastical court to try the matter, and certify to them.

One Witness
how far Evi-
dence.

But in the case of *Richardson v. Desborough*, H., 27 & 28 Car. 2 (a), a prohibition was prayed, because the spiritual court refused the proof of *plene administravit* by one witness, and it was granted; and Hale, Chief Justice, said, where the matter to be proved (which falls in incidentally in a cause before them in the spiritual court) is temporal, they ought not to deny such proof as the common law allows.

And in *Shotter v. Friend*, H., 1 Will. 3 (b), a prohibition was made and obtained, because the spiritual court would now allow the proof of the payment of a legacy by one witness. Upon which occasion the court said, such proof which is good at the common law ought to be allowed in their court, and at the common law it is not necessary to prove the payment of a debt by two witnesses; they may follow their own rules in things which are originally in their cognizance, but if any collateral matter doth arise, as concerning the payment of a legacy, if the proof be by one witness, they ought to allow it.

And in the case of *Breedon v. Gill*, E., 9 Will. 3 (c), by Holt, Chief Justice, as to the course of granting prohibitions, for not allowing evidence which would be good at the common law, the difference is thus:—When the ecclesiastical courts are possessed of a cause which is merely of spiritual conusance, the courts at common law allow them to pursue their own methods in the determination of it; but when in such case collateral matter arises, which is not of their conusance properly, there the courts of common law enforce them to admit such evidence as the common law would allow. Therefore, if the spiritual court require more than one witness, to prove the revocation of a nuncupative will, the King's Bench doth not intermeddle. But if in a suit for a legacy, payment or a release be pleaded, if they do not admit proof by one witness, the King's Bench grants a prohibition.

[In 1832, Sir J. Nicholl made the following remarks in the case of *Theakston v. Marson*:—(d)]

["But, at all events, that proof appears to stand on the single testimony of Mr. Pochin; and the court cannot wholly pass over without notice the point of law—whether the evidence

(a) Ventr. 291.

(b) 2 Salk. 547; 3 Mod. 283.

(c) Ld. Raym. 221; [Cowp. 4, 24; *Sir W. Juxon v. Lord Byron*, 2 Lev. 66; Com. Dig. tit. Prohibition (F. 13) and (G. 23). As to the evidence in

a common law court, of depositions, &c. taken in an ecclesiastical court, see Mr. Phillipp's Treatise on the Law of Evidence, vol. i. 339 to 398.]

(d) [4 Hagg. 313; see also *Donellan v. Donellan*, 2 Hagg. 145, App.]

One Witness
how far Evi-
dence.

of one witness, unsupported by any circumstances, makes legal proof of a testamentary act. The recognition of a sufficiency of such evidence seems to be big with all the dangers against which the Statute of Frauds (*e*) was intended to guard.

[“By the general law of these courts one witness does not make full proof (*f*); not that two witnesses are required to each particular fact, nor to every part of a transaction, for it often happens, that to the contents of a will, or to instructions, there is only one witness,—the confidential solicitor, or other drawer,—but there are, and must be, adminicular circumstances to the transaction,—such as the expressed wishes of the testator to make his will, the sending for the drawer of it, his being left alone with the deceased for that known purpose, some previous declarations or subsequent recognitions, some extrinsic circumstances in short, showing that a testamentary act was in progress, and tending to corroborate the act itself: but, in this case, there is nothing except Pochin’s own account of the occurrences of this quarter of an hour, not acknowledged by the deceased, nor even declared, while the deceased was yet alive, by Pochin himself, nor confirmed by his conduct. I am strongly inclined to think, that these courts have never held that such evidence of such an act, by a single witness, is alone sufficient to sustain it; and I should be unwilling to make such a precedent.”]

[One witness has been held sufficient to prove identity, it being a collateral question (*g*).—Ed.]

Depositions
and Sentence
in the Eccle-
siastical
Court.

Depositions taken in the ecclesiastical court (although the witnesses be dead) are not evidence in an action brought at common law; but a sentence given in the ecclesiastical court (it being a judicial act) may be given in evidence in an action brought in the temporal courts (*h*).

Probate of
a Will.

H., 8 Will. 3, *Hoe v. Nelthrope* (*i*). It was held by Holt, Chief Justice, that a copy of a probate of a will is good evidence where the will itself is of chattels, for there the probate is an original taken by authority, and of a public nature: otherwise, where the will is of things in the realty, because in such case the ecclesiastical courts have no authority to take probates, therefore such probate is but a copy, and a copy of it is no more than a copy of a copy.

Qualification
of Witnesses.

It is required that witnesses be persons of reputation, and free from infamy of law and fact; that they be disinterested, and so not liable to the just suspicion of partiality; that they be men of discretion, and sane memory; and all reasonable exceptions are to be allowed against them. They must be

(*e*) [29 Car. 2, c. 3, s. 19.]

(*f*) [See V. Williams on Executors and Ad. vol. i. p. 195; *Re Keeton*, 4 Hagg. 409; *Kenrick v. Kenrick*, *ibid.* 130, 136; also *Crompton v. Butler*,

1 Consist. Rep. 460.]

(*g*) [*Hunt v. Saroll*, 1 Lee, 591.]

(*h*) Wats. c. 58; see tit. **Marriage**.

(*i*) 3 Salk. 154.

deliberate, and not given to passion; consistent as to time, place and other circumstances. They must be certain and positive, and not upon hearsay or the belief of other persons. They must be free from any just suspicion of contrivance or conspiracy, or any sort of corruption or partiality (*h*). [*Vide infra*, "Exceptive Allegation."

[A person legally responsible to the proctor of one of the parties for the costs of a suit, is disqualified as a witness (*l*). In testamentary cases, an expectation of a definite and positive advantage on the establishment of a will, has been held to render a witness incompetent (*m*). By section 17 of 1 Vict. c. 26, an executor is made a competent witness to the validity of a will.—E.D.]

And the canon law requires, that they shall not be father, son, brother, sister, or other near of kin, or domestics and dependants. [But no such objection is now allowed in the Ecclesiastical Courts (*n*).—E.D.] And if the matter to be proved be merely spiritual, the common law, as was said before, will not interfere; but if a temporal matter falleth incidentally in a cause in the Spiritual Court, they must admit such evidence as the common law allows of, otherwise they will be prohibited.

He that will produce witnesses that come at a great distance, ought to tender and allow them their expenses: but the person against whom they are produced, is not bound to bear any part of those expenses, although the witnesses are bound to testify the truth on both sides. And these expenses are to be tendered and paid to them before they depart from home, without any regard had to what such witnesses might have spent in their own houses; but it ought to be considered, what their journey or travelling expenses may stand them in. And if such witness shall receive expenses for ten days, and shall be dispatched in five, he shall be obliged to render back the overplus (*o*).

Expenses
of the Wit-
nesses.

If the party hath made no agreement with his witnesses for their journey or expenses, they may then, before they are sworn, desire of the judge to order them their expenses; which he shall tax and allow, according to the condition of the parties, the time, and the distance; and decree the same to be paid before they shall be examined; or, if the witnesses desire the same, he may decree a monition to the party producing the witnesses, to pay the same; which if the said party shall refuse, he may be proceeded against to excommunication (*p*).

(*h*) 2 Still. 152.

(*l*) [*Hanley v. Edwards*, 1 Curteis, 732.]

(*m*) [*Ivory v. Lamb*, *Stirling v. Pendleton*, *Frank v. Carr*, 1 Lee, 408; *Sadyer v. Man*, *ibid.* 195; *Cooper v. Deriennie*, 1 Hagg. 482;

Arnold v. East, 2 Lee, 380. See also title *Wills*, vol. iv. of this work.]

(*n*) [See *Sumerfield v. Mackintire*, 1 Consist. 419, in note to *Turner v. Meyers*.]

(*o*) Ayl. Parerg. 536.

(*p*) 1 Ought. 121.

Commission. [The witnesses are either brought to London to be examined, or if they reside at a great distance, or are otherwise unable to attend, they are examined by Commission near their places of residence. Their attendance is required by a compulsory, somewhat in the nature of a subpœna, obedience to which is enforced in the same way as in other cases of contumacy. By modern practice a witness upon whom a compulsory has been served, may be pronounced contumacious if he does not appear on the return of the compulsory (*q*).

Compulsory. [The depositions are taken in private by examiners of the court, appointed or nominated by the registrars, approved by the judge, and confirmed by the bishop or archbishop. *Vide ante*, GENERAL PART; section 7 of 10 Geo. 4, c. 53. Witnesses so examined are, as it is technically termed, *repeated* to the truth of their depositions, before the judge or his surrogate, that is to say, they are asked before him whether their depositions contain the truth; for it is competent to the witness at this time, as well as during examination, to alter, revoke, or entirely to conceal the evidence he has given (*r*). The examination does not take place upon written interrogatories previously prepared and known; but the allegation is delivered to the examiner, who, after making himself master of all the facts pleaded, examines the witnesses by questions which he frames at the time, so as to obtain, upon each article of the allegation separately, the truth and the whole truth, as far as he possibly can, respecting such of the circumstances alleged as are within the knowledge of each witness (*s*).

[And by Rule 10 of Orders of Court of 1830, it is provided, "That the expense of taking depositions to prove facts confessed in answers, or admitted in acts of court, if taken after such confessions or admissions, shall be paid by the party producing the witnesses, unless the court shall think fit to direct otherwise."

Examination
and Cross-
Examination.

[The cross-examination (*t*) is conducted by interrogatories administered to the adverse witness when the deposition in chief is complete. The interrogatories are delivered to the examiner by the adverse proctor, but not disclosed to the witness until administered, nor to the party producing him until publication passes; and each witness is enjoined not to disclose the interrogatories, nor any part of his evidence, until after publication: in order that the party addressing the interrogatories

(*q*) [*Wyllie v. Mott and French*, 1 Hagg. 34.]

(*r*) ["*Nam tempore hujusmodi repetitionis coram iudice testis poterit omnia prius per eum deposita et per registrarium scripta, vel quamcumque partem eorundem, corrigi, revocari seu deleri potere.*" Oughton, vol. i. De Testium Examinatione, tit. 85, s. 6.]

(*s*) [*Burnell v. Jenkins*, 3 Phill. 394, 395; *Herbert v. Herbert*, 3 Phill. 36, and 2 Consist. 267.]

(*t*) [*Serjeant v. Serjeant*, 1 Curteis, 5; *Whish & Woollatt v. Hesse*, 3 Hagg. 682; *Ingram v. Wyatt*, 1 Hagg. 97; *Morse v. Morse*, 2 Hagg. 97.]

may be the better prepared, the proctor producing the witness delivers, as before stated, a designation, or notice of the articles of the plea on which it is intended to examine each witness produced.

[It was laid down by the Judicial Committee of the Privy Council, in a case recently appealed from the Court of Arches, that the principle *qui ponit fatetur*, that he who sets up a plea must be bound by the words of that plea, applies even (though with less strictness) to the framing of interrogatories; for though there may be in many instances mere suggestions for the purpose of trying the credit of the witness whether he will contradict himself, still this principle applies, for an interrogatory is framed upon that which is entirely within the knowledge of the parties, and it can never be permitted that in framing interrogatories a party should suggest falsehood in the case; the statement in the interrogatories, therefore, must not conflict with the statement in the libel or allegation (*u*).

Interrogatories must not be irreconcilable with the Plea.

[It sometimes happens that there is a deficiency in proof as to the identity; in such case, confronting of witnesses with the party may be ordered after publication, and they may be cited in order thereto, and their declaration on oath be taken down in the acts of court; but one witness to prove the identity is sufficient (*x*). And it has been the practice both of the Ecclesiastical and Admiralty Courts to rescind the conclusion of the cause, in order to admit evidence of identity (*y*); it must be proved by extrinsic evidence (*z*).—ED.]

Confronting, in what case.

If a witness is once examined in general to the libel or allegation, and his deposition closed with an *aliter nescit*, or to any such effect, he cannot afterwards be re-examined, for fear of subornation. But where an examination taken has been lost or destroyed, it may be supplied by a new examination. So if ticketed to more articles than the examination takes in, he may be examined again to those omitted. So as to interrogatories; but then the re-examination must not be extended to the libel or allegation, but to the interrogatories only.

Re-examining.

[It has been said that it is always in the power of the court to allow further pleading in a cause; and if new circumstances of importance are unexpectedly brought out on the examination in chief, which are unexpected for want of due specification in the plea (*a*), the court will, in the exercise of its discretion, allow a further plea after publication. This may also be permitted in cases where facts have either occurred or come to the knowledge of the party subsequently to publication having passed.

(*u*) [*Grant v. Grant*, Feb. 24th, 1840; judgment delivered by Dr. Lushington.] v. *Spence, Henley &c. v. Morrison*, 2 Hagg. App. 145, 146, 147.]

(*x*) [*Searle v. Price*, 2 Consist. 188.] (*z*) [*Williams v. Williams*, 1 Consist. 305; *Bird v. Bird*, 1 Lee, 345.]

(*y*) [*Donellan v. Donellan, Cargill*] (*a*) [See post, as to exceptive allegations, *contra dicta*, p. 315.]

Exceptive
Allegations.

[The examination and cross-examination of witnesses (*b*) is kept secret until publication passes, after which either party is allowed to except to the credit of any witness, upon matter contained in his deposition. The exception must be confined to such matter, and not made to general character, for that must be pleaded before publication; nor can the exception refer to matter before pleaded, for that should be contradicted also before publication; nor to answers to the interrogatories not relative to the point at issue. The exception must also tend to show that the witness has deposed falsely and corruptly. These exceptive allegations are proceeded upon, when admitted, in the same manner as other pleas. They are not frequently offered, and are always received with great caution and strictness, as they tend more commonly to protract the suit, and to increase expense, than to afford substantial information in the cause.]

[Facts collateral to the point at issue cannot be pleaded in order to discredit a witness (*c*). Specific facts cannot be pleaded in order to support the character of witness's testimony which has been impeached on the ground of general bad conduct (*d*).

[The grounds on which exceptive allegations are allowed, and the duty of the examiner as to admitting particular specifications into depositions, are thus clearly laid down by Lord Stowell in the case of *Evans v. Evans* (*e*):—

[“This is an allegation exceptive to the credit of witnesses,—and it is objected, amongst other things, that there has been improper delay in introducing it. Some delay has appeared in the progress of the cause, but I see no reason for saying that the allegation is liable to a fatal objection on that account alone, if it is in its contents admissible.

Duty of the
Examiner
with respect
to Specifica-
tion.

[“It has been made a question, incident to the general argument on these objections, what is the duty of the examiner? Whether he should have admitted particular specifications or not in taking the depositions. And it may be a matter of great difficulty to prescribe what an examiner is to do in all cases. To lay down an universal rule is impossible; but, in general, he should strongly disincline to receive specific facts, where the article, admitted by this court, is in general form.

1st Rule.

[“It must be understood to be the intention of the court, where the articles in the plea are general, that the examinations taken upon it should be likewise merely general. I will not say that cases may not arise where a specification, under such an article, may be received, particularly in cases merely civil;

(*b*) [As to when a witness may be reproduced to be re-examined, see *Reeves v. Reeves*, 3 Phill. 113; *Evans v. Knight & Moore*, 3 Phill. 423; *Wilkinson v. Dalton*, 1 Add. 339; *Lady C. Wynford v. Hillier*, 1 Lee, 274.—ED.]

(*c*) [*Sergeant v. Sergeant*, 1 Curteis, 4; *Lloyd v. Lloyd*, 2 Curteis, 262; *Trevanion v. Trevanion*, 406—486, S. C.]

(*d*) [*Lambert v. Lambert*, 1 Curt. 7.]

(*e*) [1 Consist. p. 95.]

but where it is introduced, such specification should be exact as to time, and place, and all other material circumstances: for without such exactness it remains little better than the general plea. The present case is brought for civil relief, but founded on a *criminal imputation*;—the charge is, that he has treated his wife with want of due tenderness;—and the vindication is, that she is a person of such habits (*f*) as to make the want of tenderness in some degree justifiable. It thus becomes of a criminal kind as to her also. And in examining on the general charge of habits of intoxication, the examiner ought not to admit specification, but adhere to the form of the plea. And it is a general rule, that wherever specification is introduced, it shall be so exact as to give the party full opportunity of defence.

Duty of the Examiner with respect to Specification.

[“Another rule by which the conduct of examiners, particularly in these cases of character, should be guided, is, that the facts allowed to be stated must be plain and *simple*, and not such as will probably run into intricacy of discussion or ambiguity. In *Wilson v. Wetherell* (*g*), which has been quoted by counsel, an *attack* was made, in an allegation, upon the *general* character of an individual. Several witnesses were examined upon it, and the examiner let them run on into specifications. Some said, they thought him a bad man, because he had defrauded them as members of a public company. Now fraud itself is composed frequently of such ingredients, that, to establish it, might occupy an inquiry of some years in a court of equity. How, then, could this court entertain incidentally, and only as an excrescence from the original cause, a matter which might easily have overgrown the cause from whence it sprung?

2d Rule.

[“These are general rules fit to be observed; and there is one more,—that if an examiner entertains a doubt, it is safer for him to decide in the affirmative, and to receive what the witness can say, than to reject it totally; because the court can do that at last if it thinks proper; and there is no irreparable injury done by admission, as there may be by too hasty exclusion. Subject to these observations, I shall proceed to consider this allegation. The first article is general, and excepting to the credit of certain witnesses, as persons of *infamous character*, and not to be believed on their oaths. It has been disputed whether such an article can be admitted substantively, or only as introductory, when offered *after publication*; and, most certainly, the practice has been a little fluctuating upon that subject. By the ancient text law, to which it is most safe, in such variation, to adhere, it cannot be admitted *substantively*. That principle is to be found in the Decretals (*h*). Whether the more ancient practice of our own Ecclesiastical Courts may have deviated from this rule, I do not find; but it was consi-

General Rules for exceptive Allegations contra Personae.

(*f*) [Habits of intoxication.]

(*g*) [Prerog. 27th May, 1789.]

(*h*) [Decret. Greg. lib. 2, tit. 19, c. 9.]

General Rules
for exceptive
Allegations
*contra Per-
sonas.*

dered as an existing rule in the case of *Cunnington v. Coxe*(*u*), of which I have an exact note, ‘that as to the mere general character of a witness, the exception ought to be taken before publication.’ This rule was, for the first time within my memory, impugned in *Arabin v. Arabin*(*x*), where there was an objection taken *on that ground*. The rule was sustained in the Consistory, and in the Arches; both those courts being of opinion, that a general article merely ought not to be admitted after publication. The cause went to the Delegates, upon appeal on that point from the Court of Arches; where the party appellate being anxious, on private considerations, to have the cause heard on the principal merits, and not thinking that incidental point sufficiently material to retard the proceedings, consented *to the repeal* of the two former sentences, which passed, on motion, by consent, and wholly *sub silentio*. But when that cause came on for sentence on the merits, it was strongly signified to be the opinion of one of the judges, that the old practice of excluding such matter was correct and proper.

[“In *Bailey v. Bradburn*(*y*), the same doctrine was held here very recently; and I understand the same to have been since recognized in *Raybold v. Raybold*(*z*), in the Court of Arches. I hold it, then, to be the known and existing law, and to which, till I am otherwise instructed by superior authority, I shall adhere,—that an article of this kind can be admitted only as an introductory article after publication. It must be observed, then, that it being merely introductory, the examiner is not to examine upon it.

[“The first person excepted against is Mr. Finch Mason, an officer in his majesty’s service. And it has been said, that an attack of this nature is injurious to his character. But every witness produced in a court of justice is liable to such an attack; and it does not rest with the court, but the party, if the attack is injuriously made. On this account, however, as well as on more general considerations, exceptive allegations are to be carefully watched. Parties state their case, and examine their witnesses, and it becomes occasionally an object with one party, having sinister designs, to lie by till after he has seen the depositions, and then to endeavour to get rid of such witnesses as are most likely to operate to his disadvantage. Courts of justice, therefore, are tender in suffering evidence to be attacked in this manner without strong reasons given for it. And where there is ground for it, the rule is universally laid down, that the exception taken must not be of an ambiguous nature; and the party excepted to, if on the ground of general bad character, must be attacked in such terms as plainly assert *that imputa-*

(*u*) [Prerog. 28th June, 1781.]

(*y*) [Consist. 27th Nov. 1788.]

(*x*) [Consist. 15th July, 1786; Arches, 15th February, 1787.]

(*z*) [8th December, 1789.]

tion. This is the rule for exceptions '*contra personas.*' If the exception be '*contra dicta,*' that is, arising out of the depositions of the witness, it must be observed, that, by allowing such an exception, it is not meant that you are at liberty to controvert every declaration of witnesses, but that you may except to their credit and character from what arises out of their depositions; and to do this, it must be shown that a witness has misrepresented the matter *corruptly and wilfully.* There must be what the law calls '*falsitas cum corruptione.*' Every man is liable to error; and on the supposition that a witness states his opinion from appearances, it is not merely from misapprehension, or from proof of his being deceived, that he is to be contradicted, in the way of exception to his credit; and that he is to be sent forth into the world as a person of disgraced character: This must be only from wilful and corrupt falsification.

["How will this apply to Mr. Mason? The principal facts of his depositions are such, as if contradicted, would not do more than affect him with inaccuracy or misapprehension. In one place he goes on to say, 'that he once saw Mrs. Evans in a state of disorder from liquor,' which, unless it means when he first arrived, and this is not averred, is objectionable for want of specification of time. The fact ought not to have been taken down without such plain specification, and being so defective, the court would not regard it as evidence. If the facts alleged in contradiction to him therefore were all to be proved, it would not *invalidate* his testimony as to his belief. I will not say, however, that it might not perhaps warrant an application to the court to open the cause for a defensive purpose. On this point I think the general and correct rule is, that wherever the matter is originally laid down in the libel or allegation with due specification, you shall not be at liberty to introduce a contradictory plea on account of any thing which arises on the depositions of the witnesses. But if there is such want of sufficient specification in the plea, you may then be at liberty to do it. I find this to be the text law as laid down in the Decretals, in a case of an *alibi* referred from *England* to *Rome* for decision (a). *Panormitan* (b) also lays down the rule to the same effect. And he goes on to state, if there has been a failure of due specification in the original articles, '*tunc admittitur.*' And it is the true rule, that if a fact, material in the case, has been pleaded without such specification, as would enable the party to apply his defence to it, by way of counter-plea, and he is therefore in some degree taken by surprise, on the particulars stated in the depositions of the witnesses, it is

When only
admissible.

Where there
is Want of
Specification
in the Plea.

(a) [Decret. Greg. lib. 2, tit. 20, c. 35; Mynsinger in loc. p. 68.]

(b) ["Sed tamen falsitas directa admittitur post aperturam propter ob-

livionem debitæ specificationis articulorum." Processus Jud. Ord. tit. 'Probatio formæ,' et seq.]

in the discretion of the court, under great caution, to allow him to give in a defensive plea after publication. But it would relax the rules of evidence in a way liable to abuse, and open to perjury, if I permitted that fundamental rule to be departed from, and, after publication of evidence, on a plea laid with sufficient specification, suffered the matter to be the subject of re-examination, merely because the witness had deposed circumstantially, and so as to be capable of being contradicted on some incidental points; as there can hardly ever be a cause in which some of the witnesses will not disagree with others on trifling circumstances.

Where Witness has deposed to Matter of Fact.

[“ It appears to me, that if the witnesses were to prove every thing laid in the exceptive allegation as to Mr. Mason, it would amount to no more than to show him to be mistaken, and not to show that he is a corrupt man. I therefore reject that article, and direct his name to be struck out of the general introductory article, in conformity to what I have before observed. Another witness objected to is Benjamin Frazer, the butler. Some parts of his evidence are recited, to which a direct contradiction in fact is pleaded, but others, which are mere matter of appearance, and so incapable of precise contradiction. What he has stated, as matter of fact, may affect his credit, if satisfactorily contradicted, and therefore I admit so much of this article as may establish such contradiction; but I reject the rest; and the article must be reformed accordingly.

When Allegations *contra dicta* are not admissible.

[“ With respect to the exceptions which are opposed in this allegation to the other witnesses, Glover, Newland, Tilbury, and Dr. Denman, they are (c) all reducible to one or other of the general heads, on which I have already observed. They either assign contradictions, which do not involve any impeachment of credit, or they apply to specifications, which ought not to have been introduced into the depositions; or are so imperfect as not to afford the means of defence, and on that account will not be received as evidence; or they lead to re-examination on points which have been already fully in issue between the parties, and which ought therefore not to be examined to again. There are parts of the depositions where the witnesses have spoken definitely as to time. I do not say that the conclusion of the cause might not be rescinded, in order to counterplead where they have thus spoken. But when they have spoken indefinitely, I shall not permit a contradiction to what does not in itself amount to evidence.

[“ With these considerations, I reject the particular articles mentioned, and direct the names of the witnesses in the rejected articles to be struck out of the general article, and shall suffer the rest to stand for admission when reformed (d).”

(c) [This remark was confirmed by detailed references to the allegation and depositions.]

(d) [See also the cases of *Verelst v. Verelst*, 2 Phill. 146; *Halford v. Halford*, 3 Phill. 98; *Salmon v. Crom-*

[The rule of facts '*noviter ad notitiam perventa*,' discussed under the head of Allegation, is of course applicable to exceptive allegations, and an exception to the rule laid down by Lord Stowell, that objections to a witness's general character should be averred in the responsive allegation; and the same exception is still more readily conceded to documentary evidence (*e*) which has only recently been brought to the knowledge of the party. The maxims of civilians on this point are expressed with great latitude: "*Instrumenta produci possunt post publicationem testium etiam usque ad conclusionem exclusivè, quia in his cessat timor subornationis: etiam post conclusionem, stante justâ causâ, judex potest scripturas admittere (f).*" "*Si post conclusionem reperta sint nova instrumenta, judex debet conclusionem rescindere (g).*"

Facts *noviter ad Notitiam perventa.*

[And here it should be remarked that it is a maxim of the civil and canon law that the cause is never concluded against the judge. The general rule however is, that you may not plead in contradiction to a witness what you might have pleaded in contradiction to the libel or allegation. Irrelevant interrogatories may be put before the court can interfere in any individual case, as the court does not see the interrogatories before the evidence is taken; but it invariably discountenances attempts to discredit a witness by the means of exceptive allegations contradicting the answers to such irrelevant questions (*h*). Sometimes the court will permit an exceptive allegation to be brought in, and reserve the consideration of its admission till the hearing of the cause (*i*).

Cause never concluded against the Judge.

[It has been always held that the credit of a witness may be impeached by showing him to have made declarations or statements out of court contrary to what he has sworn. And it should seem that such declarations would be the proper subject of an exceptive allegation, though there are some dicta of a learned judge in the last part of the judgment in *Atkinson v. Atkinson* (*j*), which appear to require them to be pleaded before publication and in an allegation to the principal issue. In the case of *Harwood v. Baker* (*k*), an article pleading a declaration of and excepting to a subscribed witness, was re-

Exceptive Allegations as to Declarations.

well, 3 Phill. 220; *Chapman v. Whitty and Parson*, 3 Phill. 372; *Atkinson v. Atkinson*, 2 Add. 484; *Ball v. Ball*, 3 Add. 9; *Burgoyne v. Free*, 2 Hagg. 480; *Evans v. Knight and Moore*, 1 Add. 138; *Wilkinson v. Gordon*, 2 Add. 171; *Robson v. Roche*, 2 Add. 67; *Landon v. Nettleship*, 2 Add. 247; *Brogden v. Brogden*, 2 Add. 451; *Maclean v. Maclean*, 2 Hagg. 601; *Kenrick v. Kenrick*, 4 Hagg. 139; *Goodridge and Hunter v. Slack*, 2 Hagg. 172, n.; *Inglefield v. Inglefield*, *ibid.* 174; *Mynn v.*

Robinson, 2 Hagg. 169; *Wargent v. Hollings*, 4 Hagg. 245; *Whish and Woollatt v. Hesse*, 3 Hagg. 683; *Lambert v. Lambert*, 1 Curteis, 6.]

(*e*) [*Jones v. Jones*, 1 Hagg. 254.]

(*f*) [*Maranta*, pt. 6, p. 41, s. 47.]

(*g*) [*Gail*, lib. i., obs. 107.]

(*h*) [2 Hagg. 604; 3 Hagg. 683; 1 Curt. 5; 3 Phill. 103.]

(*i*) [4 Hagg. 245.]

(*j*) [2 Add. 486. See, however, 488.]

(*k*) [Prerogative Court, 1837, confirmed on appeal, 1841.]

jected as a *responsive* allegation, but admitted *after* publication as an *exceptive* allegation. This witness was produced by the party propounding the will, but not examined by him, though tendered for cross-examination, which he underwent. The principle appears to be, that you cannot assume that a witness *has* deposed contrary to his previous declaration, but must wait for publication (*k*). It would seem however that the general practice of the ecclesiastical and common law courts on this point are the same (*l*), namely, that a witness is asked in cross-examination whether he has made certain declarations, such question being considered as the necessary foundation of a contradictory evidence to be adduced on the other side; and such question must be limited to the point at issue, and not extended to collateral issues, and must be put specifically as to time and place and person, in order that the witness may have an opportunity of explaining away the supposed contradiction, or if he deny the statement, the assigned contradiction, being positive and precise, may be pleaded (*m*).

Witness excepted against by the Party producing him.

[It seems that there are cases when an exceptive allegation will be admitted, when offered against a witness by the party producing him. The reasons for this permission are clearly stated by Dr. Haggard in his note to the case of *Mynn v. Robinson* (*n*).

[“In the two preceding cases the witnesses objected to were examined on both sides, and the exceptions were taken to that part of their evidence which was given by them when produced on behalf of the adverse party. So in *Mackenzie v. Handasyde* (*o*), an exceptive allegation was admitted to John Williams, who attested both the will and the codicil, and who was produced by one party in support of the will, and by the other party in support of the codicil; and the exception was to that part of his evidence which was given upon his production by the adverse party. But in the case in the text, *Mynn v. Robinson*, the exceptive allegation was given to a witness produced and examined only by the party excepting to him.

[“Now it is a well known rule at common law, that ‘a party cannot be permitted to produce general evidence to discredit his own witness; that is, a party cannot prove his own witness to be of such a general bad character as would render him unworthy of credit; but if a witness unexpectedly state facts

(*k*) [*Friedlander v. London Assurance Company*, 4 B. & Ad. 197; *Bradley v. Ricardo*, 8 Bing. 59.] 197; 7 Taunt. 251; 10 Ves. 474 (Sir W. Grant); 3 B. & C. 746; 2 Campb. 635; *Goodtitle v. Clayton, &c.* 4 Burr.

(*l*) [*The Queen's case*, 2 B. & B. 2224; *Rice v. Outfield*, 2 Str. 1096; 301; *Anguy v. Smith*, 1 M. & M. 474; 4 B. & Ad. 197; 8 Bing. 59.] *Ewer, &c. v. Ambrose, &c.* 3 B. & C. 746; 7 Taunt. 251.]

(*m*) [*Atkinson v. Atkinson*, 2 Add. 488; *Fitzgerald v. Elsee*, 2 Campb. 635. Cf. *Friedlander v. London Assurance Company*, 4 Bar. & Adolph. 197; 7 Taunt. 251; 10 Ves. 474 (Sir W. Grant); 3 B. & C. 746; 2 Campb. 635; *Goodtitle v. Clayton, &c.* 4 Burr. 2224; *Rice v. Outfield*, 2 Str. 1096; *Ewer, &c. v. Ambrose, &c.* 3 B. & C. 746; 7 Taunt. 251.]

(*n*) [2 Hagg. 175, and the cases cited in note.]

(*o*) [*Prerogative*, 1828, June 30.]

against the interest of the party that called him, another witness may be called by the same party to disprove those facts (*p*).’

[“ But in the ecclesiastical courts, where the depositions are never seen till all the witnesses have been examined, it is necessary that parties, though they may not before publication attack the general character of their own witness, should be permitted, after publication, directly to except to his credit; because as no plea unless exceptive, and no evidence unless on such a plea, can be given at this stage of the cause, parties would otherwise be precluded from contradicting their own witness falsely deposing to the occurrence of matters which might go to the foundation of the whole case, and yet to which it could not have been foreseen that he would speak. The variation, however, between the practice of the common law courts and of the ecclesiastical courts, arises only from the different manner in which the evidence is taken, and the different opportunities thereby afforded to a party of obviating the effect of his own witness unexpectedly deposing against him; and is a variation in form rather than in substance. At common law, the primary purpose of the examination of other witnesses is to support the party’s original case; the accidental consequence, to discredit the first witness; or, as Mr. Justice Buller expresses it, ‘ the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only (*q*).’ On the other hand, in the spiritual courts, the primary purpose of an exceptive allegation is to destroy the credit of the witness; the accidental consequence to support the original case. The practice in both courts, however different at first sight, produces the same result, and originates in the same good reason and sound principle; viz. ‘ that there is no rule of law by which the truth is on such an occasion to be shut out, and justice perverted (*r*).’ ”

[The declarations and affidavit of a deceased person, relating to matters in which he was himself concerned, have been admitted to proof as good adminicular evidence in support of other witnesses, though not of itself sufficient to support facts contrary to his own acts (*s*). An allegation on the part of the executors, responsive to a libel in a suit of subtraction of legacy, and pleading circumstances *dehors* the will, has been held admissible to explain a latent ambiguity as to the object of the bequest, where the court rejected the testator’s declarations to the drawer of the will as inconclusive, expressing at the same time a strong disinclination to their admission in such a suit under any circumstances (*t*). Marriage and the birth of a

Declarations
how far Evi-
dence.

(*p*) [1 Phillips on Evidence, 294; 556.]
and the authorities there cited.]

(*q*) [Buller’s N.P. p. 297, 5th ed.] 2 Lee, 34.]

(*r*) [Per Lord Ellenborough, C. J. in *Alexander v. Gibson*, 2 Campb. Hagg. 156.]

(*s*) [*Robins v. Sir W. Wolseley*,

(*t*) [*Capel v. Robarts and Neeld*, 3

child are presumptions of the revocation of a will made before these events; but they may be rebutted by contrary evidence, among which may be the declarations of the deceased, which are admissible to explain, though not to revoke a will (*u*). Parol declarations are ranked among the evidence of circumstance, and have always been admitted in the ecclesiastical court with other evidence. The statute of frauds does not relate to parol evidence of the facts of a subsequent will, but only prohibits the revoking of a written will for personal estate by parol (*x*). But declarations alone, unsupported by circumstances marking their sincerity and confirming their probability, are held to be insufficient to repel the presumption of law; because all declarations, where you are to rely upon the exact words of a casual expression, are liable to be misapprehended, to be misreclected and misrepresented; a slight bias in the mind of the hearer will render the apprehension and the recollection incorrect; the slightest alteration of the expression by a word, almost by a letter, may vary the whole import of the declarations (*y*). But the uniform tenor of declarations to confidential friends has been held to have considerable weight as evidence (*z*), while the mere circumstances of affection for a particular object, and declarations that it would be benefited by his death, though of some weight in an inquiry on the publication of a will, have little effect as to the revocation of an uncanceled will, the *factum* of which cannot be impeached (*a*).

Letters and Documents.

[The court will order a witness to produce any documents in his possession requisite for the purposes of the suit. Letters may be pleaded in supply of proof (*b*), and where they are destroyed, or in the possession of the adverse party, the contents may be set forth at length, leaving the other party, if he pleases, to produce the letter (*c*). The same rule is applicable to any instrument in the possession of the adverse party. The material parts only should be recited in the plea (*d*). Letters of the husband, exhibited by the wife, are evidence against him; but other statements therein, not connected with the charge, have been held not to be evidence for him in debating

(*u*) [*Johnston v. Johnston*, in which is cited *Calder v. Calder*, 1 Phill. 469; *Brady v. Cubit*, Douglas, 38. See also *Scott v. Rhodes*, 1 Phill. 17; *Wood v. Wood*, 1 Phill. 367; *Moore and Metcalf v. De la Torre and Metcalf*, 1 Phill. 404; *Capel v. Roberts and Neeld*, 3 Hagg. 165; *Stride v. Cooper*, 1 Phill. 338.]

(*x*) [*Helyar v. Helyar*, 1 Lee, 508, and the cases therein cited.]

(*y*) [*Colvin v. Fraser*, 2 Hagg. 345.]

(*z*) [*Colvin v. Fraser*, 2 Hagg. 366; *Zacharias v. Collis*, 3 Phill. 187.]

(*a*) [*Stride v. Cooper*, 1 Phill. 338.]

(*b*) [*Jenkins v. Bayley*, 1 Lee, 568.]

(*c*) [*Croft v. Croft*, 3 Hagg. 317.]

(*d*) [*Morse v. Morse*, 2 Hagg. 608; *Dinns v. Donovan*, 3 Hagg. 301; *Mynn v. Robinson*, &c. 1 Hagg. 69. See also *Jones v. Jones*, 1 Hagg. 254. See the remarks of Parke, J. and Tindal, C. J. in *Wright v. Doe dem. Tatham*, 7 Ad. & Ell. 389, in the Exchequer Chamber, on the difference between the common law and ecclesiastical courts as to the admission of letters as evidence.—ED.]

the plea (*e*). A divorce has been granted for adultery where there has been no *direct proof*, but where the evidence has been derived from the conduct and letters of the accused party (*f*). Exhibits are sufficiently proved by the confession of the adverse proctor (*g*). An exhibit, which might have been pleaded to establish identity, cannot be pleaded as evidence (*h*). Exhibits.

[Lastly, by the 12th Order of Court of 1830, it is provided, "That when any exhibits are pleaded in supply of proof, the proctor of the adverse party shall, on the day on which the plea is admitted, declare, whether he confesses or denies the handwriting, as pleaded, of such exhibits, and if the handwriting be denied, and afterwards proved, the costs occasioned by the proof shall be paid by the party who denies the handwriting, unless the court shall think fit to direct otherwise."

[A clerk in a solicitor's office, when speaking to facts within his own knowledge, may refer to a journal kept in the office for the purpose of fixing the date of those facts, but cannot refer to the journal in order to depose to facts not in his handwriting nor within his own knowledge; but if he drew the will, although he knew nothing of the instructions or of the execution, he may be produced in an allegation pleading the instructions, the drawing up, and execution of the will (*i*).

[Medical evidence may be of two kinds, the conclusions drawn by persons of skill and science as to a matter, from facts proved in the cause *aliunde*; for instance, the court may ask the opinion of medical men if so and so were the case; secondly, opinions founded upon the observation and experience of the medical man himself; this is a superior kind of evidence, and, unless it be discredited, binding on the belief of the court (*k*). Medical Evidence.

[“Something has been said” (observes Lord Stowell) “of the respect due to foreign judgments; and undoubtedly a sentence of separation in a proper court, for adultery, would be entitled to credit and attention in this court; but I think the conclusion is carried too far, when it is said that a sentence of nullity is universally binding on other countries. Adultery and its proofs are nearly the same in all countries; the validity of marriage, however, must depend in a great degree on the local regulations of the country where it is celebrated. A sentence of nullity of marriage therefore, in the country where it was solemnized, would carry with it great authority in this country; but I am not prepared to say that a judgment of a third country on the validity of a marriage not within its ter- Judgments of Foreign Courts.

(*e*) [*Neeld v. Neeld*, 4 Hagg. 267.]

(*f*) [*Grant v. Grant*, 1 Curteis, 16; confirmed on appeal, Feb. 24th, 1840.]

(*g*) [*Hillier v. Milligan*, 1 Lee, 532. See also 2 Lee, 335; 1 Hagg. 254.]

(*h*) [*Bird v. Bird*, 1 Lee, 345.

See also *Plunkett v. Sharpe*, 1 Lee, 439.]

(*i*) [*Butlin v. Barry*, 1 Curteis, 617, and note.]

(*k*) [*Collett v. Collett*, 1 Curteis, 687.]

ritories, nor had between subjects of that country, would be universally binding (*l*).” It is the ancient practice of the court not to allow the judgment of another court to be given in proof where the court cannot see the evidence upon which that judgment was given (*m*). In the recent case (1838) of *Koster v. Sape*, a foreign judgment was said to be only *prima facie* evidence of what had been decided, and to be open to examination, and impeachable. In all such cases an exemplification of the judgment is required. The general rule is, that foreign law should be proved as a fact by advocates and professors on oath, but such information has been received, not on oath, but on reliance on the honour and integrity of the professors (*n*).

Non-parochial Registers.

[The 3 & 4 Vict. c. 93 (*o*), has rendered non-parochial registers evidence, under certain conditions, in courts of justice. It enacted by

Extracts from Registers to be stamped with the Seal of Office.

Sect. 9. “That the registrar general shall certify all extracts which may be granted by him from the registers or records deposited or to be deposited in the said office, and made receivable in evidence by virtue of the provisions herein contained, by causing them to be sealed or stamped with the seal of the office; and all extracts purporting to be stamped with the seal of the said office shall be received in evidence in all civil cases, instead of the production of the original registers or records containing such entries, subject nevertheless to the provisions hereinafter contained.”

Extracts to describe the Register whence taken.

Sect. 10. “That every extract granted by the registrar general from any of the said registers or records shall describe the register or record from which it is taken, and shall express that it is one of the registers or records deposited in the general register office under this act; and the production of any of the said registers or records from the general register office, in the custody of the proper officer thereof, or the production of any such certified extract containing such description as aforesaid, and purporting to be stamped with the seal of the said office, shall be sufficient to prove that such register or record is one of the registers and records deposited in the general register office under this act, in all cases in which the register or record, or any certified extract therefrom, is herein respectively declared admissible in evidence.”

Production of Register shall be sufficient.

Certified Extract to be used in Ecclesiastical Courts;

Sect. 16. “That in case any party shall intend to use in evidence in any Ecclesiastical Court, or in the High Court of Admiralty, any extract, certified as hereinbefore mentioned, he shall plead and prove the same in the same manner to all intents and purposes as if the same were an extract from a parish register, save and except that any such extract, certified as hereinbefore mentioned, shall be pleaded and received in proof without its being necessary to prove the collation of such extract with the original register or record: provided always, that the judge of the court, on cause shown by

(*l*) [*Sinclair v. Sinclair*, 1 Consist. 81; *Lindo v. Belisario*, 1 Consist. 297.] 249; 2 Add. 391.]

(*m*) [*Price v. Clark and Pugh*, 3 Hagg. 272, per Sir W. Wynne.]

(*n*) [3 Stark. 178; 3 Hagg. 767; *Dalrymple v. Dalrymple*, 2 Consist.

(*o*) [See this act under title **Registers, Non-parochial**, in this volume.]

any party to the suit (or of his own motion when the proceedings are *in pœnam*) may, after publication, issue a monition for the production at the hearing of the cause of the original register or record containing the entry to which such certified extract relates.”

and the Judge may order the Production of the Original.

Sect. 17. “That in all criminal cases in which it shall be necessary to use in evidence any entry or entries contained in any of the said registers or records, such evidence shall be given by producing to the court the original register or record.”

In Criminal Cases Originals to be produced.

[Modern practice has established the admission of verdicts in causes of divorce for adultery, not as evidence in the suit, but to satisfy the court that the husband has honestly endeavoured to obtain all the redress which the law will afford. (See *Marriage*.) But a verdict against a clergyman for a crime indictable at common law, is held to be conclusive evidence in a suit against him in the ecclesiastical court for deprivation. So where a prohibition had been granted to the Court of Arches, and an issue had been tried as to a custom at common law, the record of the judgment is conclusive evidence to the ecclesiastical court(*p*). The principle being that the court before which the verdict or sentence of another court is brought was not competent in jurisdiction to examine or to determine upon the facts, and the judgment introduced is therefore conclusive. But the ecclesiastical court being as competent to determine on a will of personal estate as a court of common law on a real estate, all attempts to introduce a verdict for ejectment into a testamentary cause have been invariably unsuccessful(*q*); and, except in cases where it has been clearly shown to the judge that they may have a bearing on the question of costs, the inclination of the court has been strongly opposed to their introduction.

Verdicts.

[Another kind of evidence admitted by the civil and canon law is that of ocular inspection. Under the Roman law, the boundaries of property and the *servitudes* of farms and houses, were said to be best ascertained by this kind of evidence,—“*nulla est enim melior probatio quam quæ fit per aspectum et evidentiam rei* (*r*). Such inspection may be by parties appointed by the judge (as a jury of matrons in cases of impotency) or by the judge himself(*s*). In the case of *Harrington, &c. v. Franklin, &c.*, the proctor for the churchwardens making the rate for the repairs of the church of Acton prayed a view, and the judge took a view and pronounced against them. In a case where the office of the judge was promoted against a person for erecting tombstones of a greater height than had

Ocular Inspection.

(*p*) [*Bishop of Ely v. Gibbons and Goody*, 4 Hagg. 156.]

(*q*) [See the cases of *Grindall v. Grindall*, decided by Sir J. Nicholl; *Mill v. Mill and Leslie*, *Price v. Clarke and Pugh*, decided by Sir W. Wynne, reported 3 Hagg. 259, 272.]

(*r*) [See the chapter *De probationibus et præsumptionibus* (pars 2, l. 1, c. 29, ss. 26, 27) of Van Leewen's *Censura Forensis Theor. et Practic.*]

(*s*) [Arch. Hale's *Prec. in Causes of Office*, 29th Feb. 1731, before Dr. Henchman, Chancellor of London.]

been permitted by the proper authorities, and where witnesses had sworn falsely to its height, Lord Stowell said, "From my own personal inspection within these few hours, I can say that there is a considerable difference; it is visibly higher(*k*)."

Confidential
Communi-
cations.

[The ecclesiastical courts follow the same rule as those of the common law as to confidential communications; but it should be observed that the privilege of not answering to facts confidentially communicated to him by his client, is not the privilege of the attorney himself, but of his client, and if the client waive the privilege, the attorney cannot refuse to answer (*l*).

[The words "I wish you to act for me," addressed to a solicitor by a party with whom he afterwards had communication, have been held to prevent the admission of his evidence against such party, on the ground of privileged communication (*m*).

Confession of
Parties.

[In matrimonial causes the 105th canon forbids confession *alone* to be received as evidence, for without this restriction there would be no check on the collusion and imposition that might be practised on the court (*n*). But confession generally ranks highest in the scale of evidence: what is taken *pro confesso*, is taken as indubitable truth. The plea of "guilty" by the party accused shuts out all further inquiry. "*Habemus confitentem reum*" is demonstration, unless indirect motives can be assigned to it (*o*).

Felonious
Acts.

[A felony cannot be charged against a witness in direct terms in the ecclesiastical court; but it is of frequent and permitted occurrence that a fact in itself criminal should be pleaded as a necessary part of the evidence in a civil suit. Such is the case in causes of nullity of marriage by reason of a former marriage (*p*). The evidence of a "*criminis participes*" is to be heard with caution; but it is of necessity that in "*re lupanari testes lupanares admittuntur*" (*q*).

Handwriting.

[It has always been the doctrine of the court that similitude of handwriting, even with a probable disposition, is not sufficient to entitle a paper to probate without something to connect it with the deceased (*r*). In cases where handwriting is proposed to be proved by comparison with other writings, the instruments by which the comparison is to be made must be very strictly proved (*s*). Evidence to the genuineness, not of a mere signature, but of a holograph of some length, has been held to be more cogent and weighty than evidence of a contrary character (*t*). Though handwriting may be adduced both

(*k*) [*Bardin v. Calcott*, 1 Consist. 19.]

(*l*) [*Moss v. Brander*, 1 Phill. 266.]

(*m*) [*Smith v. Fell*, April 22nd, 1841, Prerog.]

(*n*) [*Burgess v. Burgess*, 1 Consist. 227.]

(*o*) [*Mortimer v. Mortimer*, 1 Consist. 315.]

(*p*) [*Nash v. Nash*, 1 Consist. 140; *Williamson v. Gordon*, 2 Add. 158.]

(*q*) [*Best v. Best*, 1 Add. 437.]

(*r*) [*Rutherford v. Maule, &c.* 4 Hagg. 224.]

(*s*) [*Beaumont v. Perkins*, 1 Phill. 82.]

(*t*) [*Constable v. Steibel, &c.* 1 Hagg. 61.]

as affirmative and negative evidence of the *factum* of an instrument, it is commonly inconclusive, and from the exactness with which it may be imitated, the inclination of the court has been rather to hold that a will cannot be proved by mere evidence as to the handwriting without some concomitant circumstance, as the place of finding or the like, to connect it with the party whose suggested will it is (*u*). Dissimilarity of handwriting, it has been said, is at all times very weak and deceptive evidence, and against positive evidence of attesting witnesses has scarcely any effect (*x*).

Necessity of
adminicular
Proof where
the Evidence
is from
Handwriting.

[This doctrine of the Ecclesiastical Courts (which will be found laid down in Clarke's *Praxis* (*y*), and Swinburne's *Treatise on Wills* (*x*)) was much canvassed before the Judicial Committee of the Privy Council in the recent case of *Wood v. Goodlake, Helps and others* (*a*). The court, composed of Lord Lyndhurst, the Master of the Rolls (Lord Langdale), the Vice Chancellor (Sir L. Shadwell), Sir Joseph Littledale, and Mr. Baron Parke, reversed the sentence of the Prerogative Court; but (as a careful examination of their judgment will show) they did not trench upon this doctrine of the Ecclesiastical Courts. It came into question twice: first, as to the validity of a testamentary paper (*A.*), which had all the suspicious circumstances of being in the handwriting of a legatee largely benefited by it, and of being found in his possession, its custody having been changed from that of the testator's to the legatee's. On this paper Lord Lyndhurst (delivering their lordships' judgment) remarked, "According to the rule of the Ecclesiastical Court in granting probate, proof of the handwriting alone of the alleged testator would not in such a case be sufficient; there must be further adminicular or corroborative evidence. Is there then such evidence in this case? And if so, it is sufficient, in connexion with other circumstances, to satisfy the court that the paper *A.* is what it purports to be. We are of opinion, that in addition to the proof of handwriting, there is sufficient confirmatory evidence to satisfy us that the paper *A.* was the act of the testator (*b*)."
Secondly, this doctrine was again discussed as to its bearing on the validity of a codicil which had been sent *anonymously by the post*. In deciding that under the circumstances probate should be also granted of this paper, the learned lord observed, "According to the rule of evidence to which I have before adverted, the Ecclesiastical Court will not grant probate on the sole evidence of the handwriting of the testator, where that is disputed. There must be some confirmatory proof. This con-

Wood's Case.

(*u*) [*Saph v. Atkinson and Westcott*, 1 Add. 212.]

(*x*) [*Young v. Brown*, 1 Hagg. 570.]

(*y*) [Page 234, tit. 166, &c.]

(*z*) [Vol. ii. p. 639.]

(*a*) [August 16th, 1841, Judicial Committee of Privy Council.]

(*b*) [It was said to be "painfully obscure," but to have the balance of evidence in its favour.—ED.]

firmatory proof must evidently vary with each particular case, and would require to be more or less stringent according to the weakness or strength of the evidence as to the handwriting. In some of the cases referred to in the arguments at the bar, the confirmatory proof appears to have been very slight. We think, however, that there are in this case, in addition to very strong evidence of handwriting, several circumstances leaving in the result no doubt on our minds that the codicil was the act of the testator." These circumstances were his evident intention to make a codicil, the nature of its dispositions, particular inaccuracies, &c. in spelling coinciding with his mode of writing in other papers. "It is true" (added the learned judge) "these are minute circumstances, but their very minuteness, we think, adds to their importance, and affords the strongest internal evidence of the genuineness of the instrument." The manner in which it was sent anonymously by the post was thought sufficiently accounted for by the bad conduct of parties in the case, who had burnt papers, &c.; but "under ordinary circumstances it would have been a most formidable and serious objection."

Wills.

[Where no party has been able to make the usual affidavit to handwriting, probate has been granted upon comparison of the signature of the deceased with others made by him at the bank; but this was by consent of all parties (c).

Attesting
Witnesses to.

[Under the old law it was usual to examine attesting witnesses to wills, or to account for their non-appearance.

[The 1 Vict. c. 26, contains the following provisions on this subject :

Will not to
be void on
account of
Incompe-
tency of at-
testing Wit-
ness.

[Sect. 14. "That if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid."

Gifts to an
attesting
Witness to
be void.

[Sect. 15. "That if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will."

Creditor at-
testing to be
admitted a
Witness.

[Sect. 16. "That in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding

(c) [*In the Goods of Cary, deceased*, 1 Curteis, 592.]

such charge shall be admitted a witness to prove the execution of Wills, such will, or to prove the validity or invalidity thereof."

[Sect. 17. "That no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof." Executor to be admitted a Witness.

[But section 4 does not absolve parties from pleading the character of a witness *in foro contradictorio*; and if a will made under this act be opposed, the attesting witness must be examined, or it must be shown that he is not competent to be examined before secondary evidence can be admitted (*d*).

[It has been held, since the passing of the Wills Act, that an executor having a legacy, *quā* executor, who renounces and releases his legacy, is a competent witness to support a will (*e*).

[The courts of equity require the will of a married woman, executed under, to be proved in the court of probate. Wills of Married Women required to be attested by Witnesses.

[This court has allowed probate of a paper to pass which purported to be the execution of a power by a married woman, enabling her to make a will attested by two credible witnesses, although one of the witnesses was wife to the executor who had not renounced, and was also a legatee. But the court did so for the avowed purpose of leaving it open to a court of equity to decide as to the due execution of the power (*f*).

[In a case where a married woman was empowered to dispose of property by will, *signed* and *published* by her in the presence of two witnesses, the court held the power not to be duly exercised by a paper purporting to be signed and sealed as a will in the presence of two witnesses, omitting to state in the attestation clause that it was published; but as the power did not require that the will should be *attested*, it admitted parol evidence to show that publication had taken place; and this being insufficient, refused probate (*g*).

[See further on this subject, title *Wills*, "*Probate*."

[The court will allow witnesses to be examined *de bene esse*, *De bene esse.* on some special cause (such as imminent danger of death) being brought to its notice (*h*).

[The recent act of 3 & 4 Will. 4, c. 41, which established the new Court of Appeal from the Ecclesiastical Courts, contains several provisions upon the subject of evidence. Evidence before Judicial Committee of the Privy Council.

By section 7 it is enacted,

["That it shall be lawful for the said judicial committee, in any matter which shall be referred to such committee, to examine witnesses by word of mouth (and either before or after examination by deposition), or to direct that the deposition of any witness shall Evidence may be taken *vivā voce*, or upon written Depositions.

(*d*) [*Guiver v. Woolcombe*, March 3, 1840, Prerog.]

(*e*) [*Munday & Berry v. Slaughter*, 2 Curteis, 79.]

(*f*) [*In the Goods of Sarah Bigger*, 2 Curteis, 336.]

(*g*) [*Walters v. Metford*, 2 Curteis, 221.]

(*h*) [1 Lee, 149, 558; 2 Lee, 442; *Herbert v. Herbert*, 2 Consist. 263, confirmed on appeal, 2 Phill. 448; *Wequelin v. Wequelin*, 2 Curteis, 263.]

be taken in writing by the registrar of the said privy council, to be appointed by his majesty as hereinafter mentioned, or by such other person or persons, and in such manner, order, and course as his majesty in council or the said judicial committee shall appoint and direct; and that the said registrar and such other person or persons so to be appointed shall have the same powers as are now possessed by an examiner of the High Court of Chancery, or of any court ecclesiastical."

Committee may order any particular Witnesses to be examined, and as to any particular Facts, and may remit Causes for Rehearing.

[Sect. 8. "That in any matter which shall come before the said judicial committee it shall be lawful for the said committee to direct that such witnesses shall be examined or re-examined, and as to such facts as to the said committee shall seem fit, notwithstanding any such witness may not have been examined, or no evidence may have been given on any such facts in a previous stage of the matter; and it shall also be lawful for his majesty in council, on the recommendation of the said committee, upon any appeal, to remit the matter which shall be the subject of such appeal to the court from the decision of which such appeal shall have been made, and at the same time to direct that such court shall rehear such matter, in such form, and either generally or upon certain points only, and upon such rehearing take such additional evidence, though before rejected, or reject such evidence before admitted, as his majesty in council shall direct; and further, on any such remitting or otherwise, it shall be lawful for his majesty in council to direct that one or more feigned issue or issues shall be tried in any court in any of his majesty's dominions abroad, for any purpose for which such issue or issues shall to his majesty in council seem proper."

[Under the old law, a commission of review was grantable under particular circumstances, with a clause for the admission of new pleas and proofs; but there must have been a special prayer and memorial to the crown for the purpose (i), otherwise the parties in review must have proceeded *ex eisdem actis* (k).

[It is further enacted by this statute:

Witnesses to be examined on Oath, and to be liable to Punishment for Perjury.

[Sect. 9. "That every witness who shall be examined in pursuance of this act shall give his or her evidence upon oath, or if a Quaker or Moravian upon solemn affirmation, which oath and affirmation respectively shall be administered by the said judicial committee and registrar, and by such other person or persons as his majesty in council or the said judicial committee shall appoint; and that every such witness who shall wilfully swear or affirm falsely shall be deemed guilty of perjury, and shall be punished accordingly."

Committee may direct an Issue to try any Fact;

[Sect. 10. "That it shall be lawful for the said judicial committee to direct one or more feigned issue or issues to be tried in any court of common law, and either at bar, before a judge of assize, or at the sittings for the trial of issues in London or Middlesex, and either by a special or common jury, in like manner and for the same purpose as is now done by the High Court of Chancery."

(i) [*Eagleton v. Kingston*, 8 Ves. 465, 466; *Popping's case*, 2 Eq. Ca. Ab. 82, note to pl. 4; Sel. Chan. Ca. 48.]

(k) [For the practice of the new court on this subject, see *Jephson v. Riera*, 3 Knapp's P. C. R. 136.]

[Sect. 11. "That it shall be in the discretion of the said judicial committee to direct that, on the trial of any such issue, the depositions already taken of any witness who shall have died, or who shall be incapable to give oral testimony, shall be received in evidence; and further, that such deeds, evidences and writings shall be produced, and that such facts shall be admitted as to the said committee shall seem fit."]

may, in certain cases, direct Depositions to be read at the Trial of the Issue;

[Sect. 12. "That it shall be lawful for the said judicial committee to make such and the like orders respecting the admission of persons, whether parties or others, to be examined as witnesses upon the trial of any such issues as aforesaid, as the lord high chancellor or the Court of Chancery has been used to make respecting the admission of witnesses upon the trial of issues directed by the lord chancellor or the Court of Chancery."]

may make such Orders as to the Admission of Evidence as is made by the Court of Chancery;

[Sect. 13. "That it shall be lawful for the said judicial committee to direct one or more new trial or new trials of any issue, either generally or upon certain points only; and that in case any witness examined at a former trial of the same issue shall have died, or have, through bodily or mental disease or infirmity, become incapable to repeat his testimony, it shall be lawful for the said committee to direct that parol evidence of the testimony of such witness shall be received."]

and may direct new Trials of Issues.

[Sect. 14 provides that the enactments of 13 Geo. 3, c. 63, and 1 Will. 4, c. 22, with regard to the examination of witnesses in *India*, shall "extend to and be exercised by" the Judicial Committee of the Privy Council.

[By section 19 it is enacted,

["That it shall be lawful for the president for the time being of the said privy council to require the attendance of any witnesses, and the production of any deeds, evidences, or writings, by writ to be issued by such president in such and the same form, or as nearly as may be, as that in which a writ of *subpœna ad testificandum* or of *subpœna duces tecum* is now issued by his majesty's Court of King's Bench at Westminster; and that every person disobeying any such writ so to be issued by the said president shall be considered as in contempt of the said judicial committee, and shall also be liable to such and the same penalties and consequences as if such writ had issued out of the said Court of King's Bench, and may be sued for such penalties in the said court."]

Attendance of Witnesses, and Production of Papers &c. may be compelled by Subpœna.

[The rule as to the introduction of new matter by way of proof into a court of appeal, is thus laid down by Oughton (l): "*In causâ appellationis a sententiâ definitivâ licet tam appellanti quam parti appellatæ, non allegata (coram judice à quo) allegare et non probata probare*"—with this restriction, "*dummodo non obstet publicatio testium productorum in primâ instantiâ*. And according to modern practice, matter which might have been pleaded in the court below, and which directly contradicts the plea on which witnesses have been examined there, is not admissible in a court of appeal; although matter more generally responsive, especially where the cause

New Matter in a Court of Appeal.

(l) [Tit. 318, pl. 1.]

has been carelessly conducted in the court below, may with due caution be received^(m). In *Fletcher v. Le Breton* (a modern case), the Court of Delegates rejected an allegation pleading facts not shown to be *noviter ad notitiam perventa*⁽ⁿ⁾. See title *Appeal*.

[Form of General Interrogatories to be administered to all the Witnesses examined on an Allegation.

[First. Admonish each witness strictly, in virtue of the oath taken by him or her, when produced as a witness, not to disclose to any person whatever, and not to converse with any person whatsoever, on the subject of his or her examination in chief; or of the nature or purport of any interrogatories administered to him or her, or of his or her answers thereto, prior to the publication of the evidence taken and to be taken in this cause; and let the nature of an oath, and the sin and danger of perjury, be fully and solemnly explained to each witness; and let him or her be admonished to give full and true answers to the several interrogatories about to be administered.

[Second. Let each witness be asked, At whose request do you attend to be examined as a witness in this cause, and when was such request made to you? Who was present at the time, and what conversation passed on such occasion? How many meetings or consultations, or conferences, as to your being so examined, have you had with the producents, or either of them, or with any other person or persons; and whom, by name, between the time of the testator's death and your present examination, and when and where were the same held? Set forth, to the best of your recollection, all that passed at such meetings, or consultations, or conferences, and the names of the several persons who were present thereat.

[Third. Let each witness be asked, Have you, or any, and which, of your fellow witnesses, to your knowledge or belief, been taught or instructed, directly or indirectly, and how, by any person, and whom, what you should depose or avoid deposing? Is the evidence you have given the whole truth, and given indifferently between all the parties in this cause?

[Fourth. Let each witness be asked, Have you, or any, and which, of your fellow-witnesses, to your knowledge, information, or belief, received or been promised, or do you or they expect to receive any, and what reward, gratuity, present, or satisfaction, directly or indirectly, for giving your or their evidence in this cause, or for refraining to give evidence as to any, and if any, what facts or circumstances affecting this cause, and from whom have you or they received, or do you or they expect to receive, the same?

[Fifth. Let the witnesses, A. L., E. S., and W. V., be asked, Were you present when, as alleged in the allegation on which you have been examined, the testator gave instructions for the making

^(m) [Price v. Clark, 3 Hagg. 265, note (a).] tive Court of Canterbury, 3 Hagg. 365.]

⁽ⁿ⁾ [An appeal from the Preroga-

his will? If yea, set forth on what day, at what hour of the day or night, and in what place, as you best recollect, were such instructions given by testator, and to whom were the same given, and were they verbally given, or in writing, and if verbally, what were such instructions, and if in writing, what has become of such writing? Did any, and what, conversation pass on the occasion interrogate between the testator and the person to whom said instructions were given; or between him, the testator, or the said person and any other person, and whom in relation thereto?—and set forth the whole of such conversation, or the tenor and purport thereof, &c. &c.

[Sixth. Let E. B. S., W. V., and S. H., be asked, In whose handwriting are the words and figures following, "Envelope indorsed the will of J. W. Esq., 2d and 3d December, 1834, red seal," written at the back of the paper marked (A) annexed to the aforesaid affidavit of the said J. P., and which have since been struck through with a pen? Are not the same in the handwriting of the said J. P.? When, on what occasion, and for what reason, were the same so written, as you know or have heard and believe?

(Signed)

J. D. for Dr. B.

[Form of Special Interrogatories administered to a particular Witness.

[First. Ask the witness, Were you not, and when, a tenant of the testator; and have you not been frequently in the habit of conversing with him? Have you not heard the testator on various occasions speak of the ministrant, J. C.? If yea, did the testator not express great regard for the ministrant, J. C.? State on what terms you have heard the testator so express himself. Was it not, as you know or believe, considered by many of the inhabitants in Gloucester, that the testator would leave him a considerable portion of his property; and did you not so believe? Should you not, from the regard you have heard the testator express for the ministrant, J. C., have been very much surprised if the testator had not by his will benefited the ministrant, J. C., to a considerable extent?

[Second. Have you not been in the habit of meeting the testator at the dinners of the corporation of Gloucester; and do you not know, that at such dinners the testator has been frequently made the subject of joke and ridicule when he was present, by some of the members of that body? On your oath, do you not know that he has been very much displeased thereat; and have you not yourself passed jokes upon him on such occasions?

[Third. Was the testator ever mayor of the city of Gloucester? Do you not know that he never was; but that, when in rotation in the list of aldermen, that he was purposely passed over, and that he considered himself slighted by the corporation, and expressed himself indignantly at such treatment? Set forth particularly all you know on the matter interrogate.

[Fourth. Were you not an alderman of the late corporation of Gloucester; and did you not, and when, serve the office of mayor?

When and why did you cease to be a member of that body? Were not the late corporation of Gloucester trustees of Sir T. R.'s Blue Coat School; and had they not the appointment of master of that school? Did you not solicit them to appoint you to that situation on the last vacancy? and did they not, and when, so appoint you, and for some and what reason? Are you not still the master of that school? Are not a great many, and how many, and who by name, of the present corporation trustees of the said school; and are you not, as such master, to some and what extent under their influence and direction? Is not H. H. W., the syndic, clerk to the trustees of Sir T. R.'s charity school? Have you been solicited by any, and which, of the trustees, or by their said clerk, to become a witness for the producents, and when?

[Fifth. Did not the testator usually apply for the order to supply the annual clothing of the Blue Coat Boys, and of the men and women of the hospitals? Do you not know that when some other tradesman has been preferred to himself for supplying such clothing, the testator has been very much displeased thereat with the corporation, and so expressed himself; and has he not, after such preference has been given, for some time absented himself from the corporation meetings?

(Signed)

B. B., Substitute for L.

Form of Compulsory.

[William, by Divine Providence Archbishop of Canterbury, Primate of all England and Metropolitan. To all and singular clerks and literate persons, whomsoever and wheresoever in and throughout our whole province of Canterbury, greeting. Whereas the Right Honourable Sir H. J., Knight, Doctor of Laws, Master, Keeper, or Commissary of our Prerogative Court of Canterbury, lawfully constituted, rightly and duly proceeding in a certain cause or business of proving in solemn form of law, by good and sufficient witnesses, the last will and testament of A. B., late of —, in the parish of —, in the county of —, deceased, bearing date the — day of — last, promoted and brought by C. D., the sole executor named in the said will, on the one part, against E. F., the natural and lawful brother of the said deceased, hath, at the petition of the proctor of the said C. D., alleging that J. T., S. L., and J. S., were and are necessary witnesses to prove the contents of a certain allegation and exhibits given in and admitted in the said cause on the part and behalf of the said C. D., bearing date the fourth session of — term, to wit, the — day of — last, who have been offered their necessary expenses, but have refused, and still do refuse to attend and give their testimony of the truth of what they respectively know in the said cause, unless by law compelled thereto, decreed the said J. T., S. L., and J. S., to be cited to appear in the manner and to the effect hereinafter mentioned (justice so requiring.) We do therefore hereby authorize, empower, and strictly enjoin and command you, jointly and severally, peremptorily to cite the said J. T., S. L., and J. S., to appear personally before our master, keeper, or commissary aforesaid, his surrogate, or some other competent

judge in this behalf, in the common hall of Doctors Commons, situate in the parish of Saint Benedict, near Paul's Wharf, London, there, on the — session of — term, to wit, —, the — day of — next, at the usual and accustomed hours of hearing causes and doing justice there, then and there to take the oath usually taken by witnesses, and to testify the truth of what they respectively know in this behalf; and further to do and receive as unto law and justice shall appertain, under pain of the law and contempt thereof. And what ye shall do or cause to be done in the premises, ye shall duly certify our master, keeper, or commissary aforesaid, his surrogate, or some other competent judge in this behalf, together with these presents. Dated at London the — day of —, in the year of our Lord one thousand eight hundred and —.

C. D.	} Deputy	
J. J.		Registers.
W. F. G.		

[This compulsory was duly executed on the within-named J. T., at his residence in —, S. L., at his residence in —, and J. S., at his residence in —, by showing them the original compulsory under seal, and by leaving with them respectively a true copy hereof, this — day of —, in the year of our Lord one thousand eight hundred and —.

By me, J. T.

[Should the person on being served therewith treat the same with contempt, that is, not obey the order, the proctor of the party at whose suit the compulsory issues, procures a written notice to be served upon him, intimating his intention of applying to the court on a stated day, to pronounce him in contempt, and direct the same to be signified (m).

7. Costs.

[The question of costs in the Ecclesiastical Courts is, for the most part, a matter in the discretion of the judge, according to the nature and justice of the case; and the reasons for granting or refusing costs are publicly expressed at the time of giving the judgment. Costs.

[If either party be condemned in costs, the proctor (n) of the other party brings in his bill. The bill is referred to the registrar, who is attended by the proctors on both sides, and, after examining the bill item by item, he allows or disallows or modifies the several charges, according to the established practice, where such practice exists; and, in other cases, according to the reasonableness of each charge: having taken off all overcharges, he reports to the judge, in open court, the amount of the bill as allowed, and the proctor makes oath Proctor's Bill referred to Registrar.

(m) [See GENERAL PART, "Execution of Sentence."]

(n) [See title Proctor, in this volume.]

that the sum reported has been necessarily expended by or on behalf of his party. If no objection has been offered to the report, the judge then taxes the bill at that sum, and decrees a monition for the payment of it; but if either party is dissatisfied with the report of the registrar on any item of the bill, the objection may be brought before the court for its decision. The regular charges are, however, so well known and established, and the registrars of the several courts, who are acting under the sanction of an oath of office, are so experienced and respectable, being generally selected out of the body of proctors, on the ground of their high character and professional knowledge, that an exception to their report as to costs rarely occurs.

[The payment of the costs thus taxed, as between *party and party*, is enforced by the process of *contumacy*, *significavit*, and *attachment*; but costs as between proctor (*g*) and client cannot be taxed by the judge, nor the payment thereof be enforced by the court; the proctor must recover his bill of costs against his client by an action at law (*h*).

General Principles with respect to.

[It has always been held in the ecclesiastical courts, that costs are matters of discretion, but not of a capricious but a legal discretion, exercised according to a just consideration of all the circumstances, and with an adherence to general rules and former precedents (*i*). A client is, under all circumstances, entitled to a detailed bill of costs from his proctor, but where this has been delivered in, and long acquiesced in, and payment made, he is not entitled, after the suit is over, during which he has not been *inops consilii*, to have it referred to the registrar for examination (*k*). A monition for the payment of costs will be enforced, if necessary, by the further aid of the court (*l*). If a party committed for non-payment of costs under an *erroneous process* be thereupon released, the court is bound, at the application of the party to whom they are still due, to issue a new monition for payment of such costs (*m*). The court will sometimes give, in lieu of full costs, a smaller sum *nomine expensarum*. It has also pronounced an Irish peer in contempt for non-payment of costs, and directed such contempt to be signified, leaving the lord chancellor to decide whether the writ *de contumace capiendo* should issue. See *ante*, under GENERAL PART, "*Execution of Sentence*;" the act of parliament which passed in consequence enabling the

(*g*) [See title *Proctor*, in this volume.]

(*h*) [Rep. of Eccles. Comm. 19; see *Peddle v. Evans*, 1 Hagg. 684; *Peddle v. Toller*, 3 Hagg. 287.]

(*i*) [*Lagden v. Robinson*, 1 Consist. 505; *Burnell v. Jenkins*, 2 Phill. 400; *Wilson v. M'Nath*, 3 Phill.

92; *Griffith v. Reed*, 1 Hagg. 210; *Goodall v. Whitmore*, 2 Hagg. 374.]

(*k*) [*Peddle v. Toller*, 3 Hagg. 296.]

(*l*) [*Coates v. Brown*, 1 Add. 345.]

(*m*) [*Austin v. Dregger*, 1 Add. 307.]

Court of Chancery to sequester estates of privileged persons for costs.

[The costs are taxed at a certain sum (say 100*l.*) “besides the expense of a monition;” but if a monition be necessary, the expenses of it falls, and of course any further expense, which disobedience to the monition may occasion, on the disobeying party (*n*). But if many charges are made and very few proved, the party against whom they are brought, will not be condemned in the expenses of the whole proceeding (*o*). Where a prohibition has been applied for, the common law courts have no power either by custom or by the stat. 1 & 2 Will. 4, c. 21, to allow to the successful party his costs in the ecclesiastical court. And this court will not, on the other hand, include the expenses incident to proceedings for a prohibition in its taxation of costs (*p*). It was so decided by the judge of the Consistory of London in the recent case of *Thoroughgood* (*q*).]

Taxation of
Costs.

[The court has the power in all cases upon application made to it, to direct security to be given for costs by either or all of the parties. Where a next friend or guardian has been appointed *ad litem*, in order to propound on behalf of minors residuary legatees a paper, which their father opposed (*r*), such guardian has been required to give security for costs. But such security has not been required to be given by a husband, against whom a wife has instituted a suit for adultery on a suggestion unsupported by affidavits, that he was going abroad (*s*). And here it may be observed, that the general rule is, that a wife is entitled to have her costs taxed at all times. The object of the law, in permitting a *de die in diem* taxation, was to obviate any inconvenience or delay that might otherwise arise in the progress of the cause, from the wife's want of funds to meet the costs; and they have been so taxed, *i. e.* *de die in diem*, even where the wife has had a separate income (*t*). But if this taxation *de die in diem* has been neglected, they will not be enforced by a court of appeal, nor where such taxation has been omitted and the suit has abated (*u*). Such is the strict rule; but usually costs are only taxed from term to term, and for the *hearing*.]

Security for
Costs;

in civil Suits;

[And in criminal suits, one of the reasons why an application must be made to the judge before his office is promoted

in criminal
Suits.

(*n*) [*Coates v. Brown*, 1 Add. 351.]

(*o*) [*Bardin v. Calcott*, 1 Consist.

20.]

(*p*) [5 B. & A. 458; 1 B. & A. 154; 1 Str. 154.]

(*q*) [Hil. Term. 1841.]

(*r*) [Orders of Court, Hilary Term, 1830, Rule 13; *Copeland v. Rivers*, 3 Hagg. 279.]

(*s*) [*Turton v. Turton*, 3 Hagg.

345.]

(*t*) [*Beevor v. Beevor*, 3 Phill.

262; *Cheale v. Cheale*, 1 Hagg. 375; *Westmeath v. Westmeath*, 2 Hagg.

133, Sup.]

(*u*) [2 Hagg. Sup. 133; 5 B. & A. 458; 1 Hagg. 379.]

is, that he may consider the fitness of the person to be made responsible for costs to the other party (*x*).

[Where it is proved to the court that a party instituting his suit became bankrupt since the suit began, it will order such party to give security for costs, before it allow further proceedings in the cause. The court required such security in the recent case of *Goldie v. Murray*, saying, that it did not think it had the power to order the assignees to do so, as the common law courts seemed to have (*y*). There appears to be no reason for the supposition that this power of the court, to order security for costs, applies principally to testamentary cases (*z*).

Appeals in
respect of
Costs.

[The giving costs is not a matter absolutely unappealable, though such appeals, especially for trifling sums, are much to be discouraged (*a*). An appeal is perempted by doing any subsequent act in furtherance of the sentence, viz., attending taxation of costs (*b*). On an appeal from a grievance, the court will not enforce payment of the costs incurred in the inferior court (*c*) before the final hearing; but then the court, in cases not matrimonial, may give costs in both courts.

Costs in
Court of Ap-
peal.

[The statute of 3 & 4 Will. 4, c. 41 (establishing the Judicial Committee of the Privy Council), contains the following provision with respect to costs.

[By section 15 of that act it is provided "That the costs incurred in the prosecution of any appeal or matter referred to the said judicial committee, and of such issues as the said committee shall under this act direct, shall be paid by such party or parties, person or persons, and be taxed by the afore-said registrar, or such other person or persons, to be appointed by his majesty in council or the said judicial committee, and in such manner as the said committee shall direct."

Costs in
Matrimonial
Suits.

[It has been said that in matrimonial suits the general principle is, that the husband pays the costs of the wife, but where a wife has an income correspondent to her own expenses and the necessary expenses of the suit, *for both must appear*, there is no longer any reason that she should be a privileged suitor. It may turn out that on the result of the proceedings, she is still entitled to costs, but by a variety of cases it has been decided, that where there is an independent income, competent to the support of the wife and the maintenance of the suit, the privilege is no longer considered to continue (*d*). And see title *Marriage*.

(*x*) [*Carr v. Marsh*, 2 Phill. 204.]

(*y*) [Prerog. Court, May 12, 1841. See *Mason v. Polhill*, 1 Compton & Meason, 620; Tidd's New Practice, 346.]

(*z*) [*Turton v. Turton*, 3 Hagg. 346.]

(*a*) [*Lloyd v. Poole*, 3 Hagg. 477.]

(*b*) [*Lloyd and Clarke v. Poole*, 3 Hagg. 477.]

(*c*) [*Brisco v. Brisco*, 3 Phill. 38.]

(*d*) [*Wilson v. Wilson*, 2 Consist. 204, per Lord Stowell; and 1 Lee, 90, 640.]

[As a general principle, where an offence has been committed, the expense of correcting it is to be borne by the offender; full costs, however, are not given in all cases, but are mitigated according to the discretion of the court (*e*).]

In Criminal Suits.

[Costs are almost universally decreed in suits for Church rates, where the rate is pronounced to be subtracted (*f*).]

In Suits for Church Rates, and against Church-wardens.

[With respect to parish officers, whose duty it is to be alert to support public decency, and to put themselves forward to act upon the law, they are always entitled to the protection of the court, if they act with fairness and candour. They have been condemned in costs where the party proceeded against in substance succeeded, and the suit was rendered necessary by the undue suppression of information (*g*).]

[In interest causes, where the suitor whose interest has been denied succeeds in establishing it: costs follow, almost of course, without some *special* ground of exception to the rule (*h*).]

In Interest Causes.

[A pauper so admitted in the middle of a suit, may *at least* be condemned in costs up to the time of his being admitted a pauper (*i*). And so where capacity and volition are established, a party appearing *in formâ pauperis*, who after long acquiescence has called in probate of a will, on a suggestion of incapacity, fraud and circumvention, may be condemned in costs and the taxation be suspended (*k*).]

Where suit is *in formâ pauperis*.

[It is only under special circumstances, that the court directs costs to be paid out of the testator's estate. Indeed it is only in modern times that it has found itself authorized to do so (*l*). The principle on which costs are given out of the estate is, that the party was led into the suit by the state of the deceased's testamentary papers (*m*).]

In Testamentary Causes.

[It seems to be a general rule that where a party propound a paper *loco executoris* and establishes it, that he is entitled to his costs, whether he be actually an appointed executor or le-

Legatee.

(*e*) [*Griffiths v. Reed*, 1 Hagg. 210; *Jenkins v. Barrett*, 1 Hagg. 12. See also *Lee v. Matthews*, 3 Hagg. 176; *Palmer v. Tijou*, 2 Add. 203; *England v. Williams*, 2 Add. 309; *Clinton v. Hatchard*, 1 Add. 104; *Taylor v. Morley*, 1 Curteis, 470.]

(*f*) [*Goodall v. Whitmore*, 2 Hagg. 374. See also *Thomson v. Cooper*, 3 Phill. 639, 640, in note. There are exceptions, however, to this rule; see *Chesterton and Hutchins v. Farlar*, 1 Curteis, 345, 367, 371; and *Hawes v. Pellat*, Arches, 1841.]

(*g*) [*Lloyd v. Poole*, 3 Hagg. 477; *Griffiths v. Reed*, &c. 1 Hagg. 210; *Jenkins v. Barrett*, 2 Hagg. 375; *England v. Williams*, 2 Add. 203, 309; *Groves, &c. v. Rector of Horn-*

sey, 1 Consist. 197; *Burgess v. Burgess*, 1 Consist. 393.]

(*h*) [*Northey v. Cook*, 2 Add. 294; *Sullivan v. Haydon*, 1 Lee, 12; *Tucker v. Westgarth*, 2 Add. 352.]

(*i*) [*Filewood v. Cousins*, 1 Add. 286.]

(*k*) [*Wagner v. Meurs*, 2 Hagg. 524; *Peddle v. Toller*, 3 Hagg. 299; *Grindall v. Grindall*, 4 Hagg. 10; *Cox v. Hume, &c.* 4 Hagg. 398.]

(*l*) [*Dean v. Russell*, 3 Phill. 334.]

(*m*) [*Hillam v. Waller*, 1 Hagg. 74. See also 3 Hagg. 33; 3 Phill. 33; 3 Phill. 119; 1 Hagg. 115, 133, 142, 212, 235, 713; 2 Hagg. 235; 3 Hagg. 212, 216, 242, 280, 447, 465, 547, all cases in which costs were given. In *Dean v. Russell*, 3 Phill. 334, they were refused.]

Executors.

gatee. Legatees have a right to call for proof *per testes*, though they have received their legacy, but there the right stops; and further proceedings, on slight or vexatious grounds, subject them to costs (*n*). But if an executor swears to and takes probate of a will, being affected with the knowledge of the existence of a later will, he will be condemned in costs (*o*): and he was held subject to the same penalty, where he failed in an attempt to prove a will, procured by his own agency under circumstances of great suspicion (*p*); but he has a right to call on the executor of a later will to propound his will in solemn form, and to interrogate his witnesses: but if he proceeds further and fails, he will be liable to costs (*q*). But where an executor propounds a second will, in opposition to a prior will which is admitted to be genuine, and fails in his proof from any suspicion of fraud, or the exertion of undue influence, he will be subjected to costs (*r*); and even where no fraudulent act has been imputed by the court, he will be under certain circumstances condemned in costs (*s*). Executors who have *intermeddled* are subject to the same penalty, if they resist the attempt to compel them to take probate; or where they refuse to exhibit an inventory as they are bound to do (*t*). Where an administration limited to substantiate proceedings in Chancery had been decreed, the next of kin having been cited, and due inquiries having been made after a will, and such administration was subsequently called in by the executors of a will, not produced till long afterwards, it was ordered to be redelivered out, but the executors, who might have taken an *et cæterorum* probate, were condemned in costs (*u*).

Creditors.

[When a creditor has been compelled to take out administration in order to recover his debt, and the next of kin, who might have appeared earlier, subsequently prays for administration in preference to the creditor, the latter will be entitled to costs (*x*).

Next of Kin.

[When next of kin are cited to see proceedings, they are entitled to their costs out of the estate (*y*). The general rule seems to be, that a next of kin has the right of putting executors to proof of a will by examination of witnesses (*z*) on oath, and if he proceeds no further than cross-examination of the witness whom the examiner produces, he is not liable to costs of the examination, though the will be established.

(*n*) [3 Add. 60; 1 Lee, 537; 2 Add. 101; 1 Hagg. 610; 3 Hagg. 283; 2 Phill. 323.]

(*o*) [2 Lee, 356.]

(*p*) [1 Hagg. 624; 1 Add. 219.]

(*q*) [3 Phill. 22.]

(*r*) [1 Add. 219; 2 Hagg. 81, 141, 209, 211; 4 Hagg. 345; 1 Curteis, 125.]

(*s*) [4 Hagg. 290, 328; 1 Curteis, 33.]

(*t*) [3 Hagg. 776; 1 Phill. 241.]

(*u*) [*Harris v. Milburn*, 2 Hagg.

62.]

(*x*) [*Cole v. Rea*, 2 Phill. 428; *West v. Smith*, 2 Phill. 374.]

(*y*) [1 Hagg. 244.]

(*z*) [*Chapman v. Guy*, 2 Lee, 33; 1 Hagg. 340.]

[If the case be a fair and proper one for judicial investigation, and he proceeds to give an allegation and examine witnesses, and yet fails, he may be allowed his costs out of the estate; but if the judge should think he ought to have been satisfied with cross-examining the witness in support of the will, he may leave him to pay his own costs; but if such next of kin shall appear to have given a vexatious opposition, and to have exercised his privilege of cross-examining the witness improperly, he may be condemned (a) in the whole costs, or those only incurred by his allegation, as the case may seem to require.

[A proctor may be condemned in costs for improper practices in the conduct of a suit, besides being subject to other punishment for extortionate charges (b). As to the power of the court to release a party imprisoned for contumacy, on the payment of costs, see GENERAL PART, "*Execution of Sentence.*" Proctor.]

[Monition for Costs.]

[William, by Divine Providence Archbishop of Canterbury, Primate of all England and Metropolitan. To all and singular clerks and literate persons whomsoever and wheresoever in and throughout our whole province of Canterbury, greeting. Whereas the Right Honourable Sir H. J., Knight, Doctor of Laws, Master, Keeper or Commissary of our Prerogative Court of Canterbury, lawfully constituted, rightly and duly proceeding in a certain cause or business of proving in solemn form of law the last will and testament of G. K., late of Reading, in the county of Berks, deceased, promoted by J. S., the sole executor named in the said will, against J. M., the natural and lawful brother and only next of kin of the said deceased, which was lately depending in judgment before him, and in which cause or business a pretended codicil to the said will was propounded on behalf of the said J. M., did, at the petition of the proctor of the said J. S., condemn the said J. M. in the costs of the said J. S. And whereas on the day of the date hereof, the proctor of the said J. S. corrected a bill of costs on behalf of his said party, which our said master, keeper, or commissary, rightly and duly proceeding thereupon, moderated at the sum of — pounds and — shillings of lawful money of Great Britain and Ireland, current in Great Britain, to be paid to the said J. S. or his proctor, besides the expenses of his monition, and decreed the said J. M. to be cited and admonished to pay or cause to be paid the said sum of — pounds and — shillings, the amount of the said costs, to the said J. S. or his proctor in manner and form hereinafter mentioned, (justice so requiring). We do therefore hereby authorize and empower, and strictly enjoin and command you, jointly and severally, that you monish or cause to be monished peremptorily the said J. M.]

(a) [Stratton v. Ford, 2 Lee, 216, 217; 3 Hagg. 790; 2 Phill. 224; 1 Add. 254; 2 Hagg. 162; 4 Hagg. 27; 3 Hagg. 547.] (b) [Prentice v. Prentice, 3 Phill. 311; 3 Hagg. 255. See title Proctor, in this volume.]

[Practice—Fees and Stamps.]

(whom we do so monish by the tenor of these presents) to pay or cause to be paid to the said J. S. or his proctor the sum of — pounds and — shillings, the amount of the said taxed costs, within fifteen days after the due execution of this monition upon him, under pain of the law and contempt thereof. And what you shall do or cause to be done in the premises you shall duly certify our said master, keeper or commissary, his surrogate, or some other competent judge in this behalf, together with these presents. Dated at London the — day of —, in the year of our Lord one thousand eight hundred and thirty — and in the — year of our translation.

J. D. } Deputy
J. I. } Registers.
C. B. }

[Certificate.]

[This monition was personally served on the above-named J. M., by showing to him the same under seal, and leaving with him a true copy hereof, at Reading, in the county of Berks, this — day of —, in the year of our Lord one thousand eight hundred and thirty —.

By me, G. S.

[Appeared personally the above-named G. S., of Reading, in the county of Berks, Gentleman, and being sworn made oath that the whole body, series and contents of the above certificate, to which I have set and subscribed my name, were and are true.

G. S.

[On Monday, the second day of June, —, the above-named G. S. was duly sworn to the truth of the above affidavit, at Reading, in the county of Berks.

Before me, J. W.,
A Master Extraordinary in Chancery.

[8. Fees and Stamps.]

[The 10 Geo. 4, c. 53 (passed on the 19th of June, 1829), empowered the judges of the Courts sitting at Doctors' Commons to establish new Tables of Fees, for which, as well as the statute, see title *Fees*, vol. ii. p. 266.

[By 5 Geo. 4, c. 41 (passed on the 28th of May, 1824), all stamp duties payable on pleas in the Ecclesiastical Courts, both of England and Ireland, are repealed.

[For the power of the Ecclesiastical Court to entertain a suit for the subtraction of burial fees, see *Spry v. Guardians of Marylebone* (c); and of procurations, see *ante*, 187.

(c) [2 Curteis, 5.]

Pramonstratenses—See **Monasteries**.

Pramunire—See **Courts**.

Præstation—See **Pension**.

Preaching—See **Public Worship**.

Prebendary.

THE law concerning prebendaries, canons and other members of the chapter in cathedral and collegiate churches, falleth in under the title **Deans and Chapters**.

Prerogative Court—See **Court** and [**Practice**.]

Presentation.

PRESENTATION or collation to a living is treated of under the title **Benefice**.

Presentation to popish livings is treated of under the title **Popery**.

Priest—See **Ordination**.

Primate—See **Bishops**.

Prior—See **Monasteries**.

Private Chapels—See **Chapel**.

Privileges (a) and Restraints (b) of the Clergy.

1. <i>As to temporal Offices</i> . . . 342 2. <i>Not to be arrested in attending Divine Service, and other Privileges</i> 345 3. <i>Sheriff cannot levy of his Ecclesiastical Goods, and as to Distresses</i> 350 4. <i>Freedom from Tolls, &c.</i> . . . 353 5. <i>Apparel, &c.</i> 354 6. <i>Punishment of criminous</i>	<i>Clerks, under 3 & 4 Vict. c. 86</i> 357 7. <i>Illegal Farming and Trafficking, under 1 & 2 Vict. c. 106</i> 8. <i>Punishment for these Offences, and for Non-residence, under this Act</i> 366 9. <i>Profession cannot be relinquished, or two Benefices served in one Day</i> . . . 374
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I. *As to temporal Offices.*

Not bound to serve in a temporal Office.

THE common law, to the intent that ecclesiastical persons might the better discharge their duty in celebration of divine service, and not be entangled with temporal business, hath provided that they shall not be bound to serve in any temporal office (c).

And although a man holdeth lands or tenements, by reason whereof he ought to serve in a temporal office, yet if this man be made an ecclesiastical person within holy orders, he ought not to be elected to any such office; and if he be, he may have the king's writ for his discharge (d).

And this, although it be an office which he may execute by deputy: Thus in the case of *The Vicar of Dartford*, H., 12 Geo. 2, the court granted to him a writ of privilege against serving the office of expeditor to the commissioners of sewers, though it was insisted that this was an office which might be executed by deputy (e).

Not restrained from serving in a temporal Office.

The popish foreign canon law forbids secular offices and employments to persons in holy orders. So do the following constitutions:—

“No clergyman shall be an advocate in the secular court in a cause of blood, or in any other cause but such as are allowed by law. And if any shall do otherwise, if it be in a cause of blood, he shall be *ipso facto* suspended from his office; and if in any other cause, he shall be punished by his diocesan according to his discretion. And in causes of blood which shall extend to life or member, we do strictly enjoin, that no clergyman presume to be a judge or an assessor; and he who shall act contrary hereunto, besides the suspension from his office, which he shall *ipso facto* incur, shall be otherwise pu-

(a) [See title *Conbocation*, and ciplina, by Thomassin, vol. iii. c. 3.—
 preface to this work.—ED.] ED.]

(b) [See titles *Deprivation*, *Plu-* (c) 1 Inst. 96.
rality, *Residence*, *Visitation*. For (d) 2 Inst. 3.
 the ancient canon law on this subject, (e) Str. 1107.
 see the *Vetus et Nova Ecclesiæ Dis-*

nished according to the discretion of his superior: From which sentence of suspension he shall by no means be absolved by his diocesan, until he shall have made competent satisfaction(*f*)."

And, more particularly, by another constitution of the same legate: "Whereas it is unbecoming for clergymen employed in heavenly offices to minister in secular affairs; we think it sordid and base, that certain clerks greedily pursuing earthly gain and temporal jurisdictions, do receive secular jurisdiction from laymen, so as to be named justices, and to become ministers of justice, which they cannot administer without injury to the canonical dispositions, and to the clerical order: We, desiring to extirpate this horrid vice, do strictly enjoin all rectors of churches and perpetual vicars, and all others whatsoever constituted in the order of priesthood, that they receive no secular jurisdiction from a secular person, or presume to exercise the same; and if they do, they shall relinquish the same within the space of two months, and never resume it; and whosoever shall attempt any thing contrary to the premisses, shall be *ipso facto* suspended from his office and benefice; and if he shall intrude into his office or benefice during such suspension, he shall not escape canonical vengeance, which shall not be relaxed until he shall have made satisfaction at the discretion of his diocesan, and taken an oath that he will not do the like again. Saving the privileges of our lord the king in this behalf(*g*)."

Which saving (Mr. Johnson says) entirely defeated the constitution. And in the former constitution there is also a saving for such causes *as are allowed by law* (*h*).

But if those savings had not been expressed, yet it is certain that the constitution could not have altered the law of the land in this respect. And it is well known that the kings of England in all ages have asserted a right to employ what subjects they pleased, of the clergy as well as laity, in any post of civil government; and, in fact, very many clergymen have been chancellors, treasurers, and even chief justices of the King's Bench, and consequently must have sate judges in cases of life and death (*i*).

[“Where a petition was made that an ecclesiastical person should not be chancellor, treasurer, clerk of the privy seal, baron of the exchequer, chamberlain of the exchequer, comptroller, &c., the king answered, that he will do as he thinks fit(*j*).”]

[It is worthy of observation that all the chancellors of England, from the time of Becket to Wolsey, were either civilians or ecclesiastics. Walter de Merton (*k*), so justly celebrated as

(*f*) Othobon, Athon, 91.

(*g*) Athon, 89.

(*h*) Johnson's Othob.; Athon, 91.

(*i*) [1 Bl. Comm. c. 17.]

(*j*) [2 Rol. 221, l. 5.]

(*k*) [See Colleges, preliminary remarks.—Ed.]

the founder of the collegiate system in the universities of this country, was bred to the law, and was several times chancellor during the troubled reign of Henry the Third, before the close of which he became Bishop of Rochester. The last bishop who has filled this high office was Dr. Williams, Bishop of Lincoln and Dean of Westminster, and afterwards Archbishop of York. This prelate held the great seal from 1621 to 1625. One of the negotiators for the Treaty of Utrecht was the Bishop of Bristol, the last precedent which our history affords for the employment of a prelate in diplomatic services.—ED.]

And by the statute of *Articuli cleri*, 9 Edw. 2, st. 1, c. 8, it is complained as followeth: "The barons of the king's exchequer claiming by their privilege, that they ought to make answer to no complainant out of the same place, extend the same privilege unto clerks abiding there, called to orders or unto residence, and inhibit ordinaries that by no means, or for any cause, so long as they be in the exchequer, or in the king's service, they shall not call them to judgment." Unto which it is answered: "It pleaseth our lord the king, that such clerks as attend in his service, if they offend, shall be corrected by their ordinaries, like as other; but so long as they are occupied about the exchequer, they shall not be bound to keep residence in their churches. This is added of new by the council: The king and his ancestors, since time out of mind have used, that clerks which are employed in his service, during such time as they are in service, shall not be compelled to keep residence in their benefices; and such things as be thought necessary for the king and commonwealth, ought not to be said to be prejudicial to the liberty of the church."

So long as they are occupied about the Exchequer.—And the Court of Exchequer may grant a prohibition to the ordinary, for any that ought to have the privilege of the exchequer, where the court may give the party remedy, or where a suit dependeth in the Court of Exchequer for the same cause; or where the king's service, which is the cause of the privilege, is hindered by the suit before the ordinary: as for non-residence, during the time that he gave his necessary attendance in the exchequer for the king's service (*l*).

Added of new by the King's Council.—That is, by the common council of the realm, as it is termed in original writs, and in other legal records, and so it is taken in other acts of parliament, and in the preamble to the same *Articuli Cleri*(*m*).

That Clerks which are employed in his Service.—This branch is general, and not limited (as the former is) to the privilege of the exchequer; but extendeth to any other service of the king for the commonwealth: as if he be employed as an

(*l*) 2 Inst. 624.

(*m*) Ibid.

ambassador into any foreign nation, or the like service for the king, which is (as it is here said) for the commonwealth, which ever must be preferred before the private (*n*).

[But notwithstanding the *Articuli Cleri*, 9, the goods of ecclesiastical persons may be taken for issues or other dues to the king (*o*).—ED.]

Ecclesiastical persons have this privilege, that they ought not in person to serve in war; [for *militans Deo ne implicet se negotiis secularibus* (*p*).] Not bound to serve in War.

By the statute of 52 Hen. 3, c. 10, "For the tourns of sheriffs, it is provided, that archbishops, bishops, nor any religious men or women, shall not need to come thither, except their appearance be specially required thereat for some other cause." Not bound to appear at the Tourn or Leet.

The Tourns of Sheriffs.]—Nor consequently are they bound to appear at the leet, or view of frankpledge (*q*).

Nor any religious Men.]—Men of religion, in the proper sense, are taken for those that are regulars, as being professed in some of the religious orders, as abbots, priors, and the like; but ecclesiastical persons that are seculars, that is, who do not live under the rules of any of the religious orders, as bishops, deans, archdeacons, prebends, parsons, vicars, and such like, are also within this act (*r*).

Shall not need to come thither.]—That is, they are not compellable to come, but left to their own liberty. And if any man be grieved in any thing contrary to the purview of this statute, he shall have an action grounded upon the statute for his remedy and relief therein (*s*).

Except their Appearance be specially required thereat for some other Cause.]—As to be a witness, or the like (*t*).

II. *Not to be arrested in attending Divine Service, and other Privileges.*

By the 50 Edw. 3, c. 5, it is enacted as follows: "Because that complaint is made by the clergy, that as well divers priests, bearing the sacrament to sick people, and their clerks with them, as divers other persons of holy church, whilst they attend to divine services in churches, churchyards, and other places dedicate to God, be sundry times taken and arrested by authority royal, and commandment of other temporal lords, in offence of God and of the liberties of holy church, and in disturbance of divine services aforesaid; the king granteth and defendeth, upon grievous forfeiture, that none do the same from henceforth: so that collusion or feigned cause be not found in any of the said persons of holy church in this behalf." Not to be arrested in attending Divine Service.

(*n*) 2 Inst. 624.

(*o*) [2 Inst. 627.]

(*p*) [2 Inst. 4.]

(*q*) 2 Inst. 4.

(*r*) 2 Inst. 121.

(*s*) 2 Inst. 121, 122.

(*t*) 2 Inst. 121.

And by the 1 Ric. 2, c. 15, it is thus further enacted: "Because that prelates do complain themselves, that as well beneficed people of holy church, as other, be arrested and drawn out as well of cathedral churches, as of other churches and their churchyards, and sometimes whilst they be intended to divine services, and also in other places, although they be bearing the body of our Lord Jesus Christ to sick persons, and so arrested and drawn out, be bound and brought to prison, against the liberty of holy church; it is ordained, that if any minister of the king or other, do arrest any person of holy church by such manner, and thereof be duly convict, he shall have imprisonment, and then be ransomed at the king's will, and make gree to the parties so arrested: provided, that the said people of holy church shall not hold them within the churches or sanctuaries by fraud or collusion in any manner."

And their Clerks with them.]—By this it appears that the clerk who is assistant may have this privilege (*u*).

Whilst they attend to Divine Service.]—It hath been adjudged upon this, that in going, continuing, and returning, to celebrate divine service, the priest ought not to be arrested, nor any who aid him in it (*x*).

By Authority Royal.]—But this extendeth only to cases betwixt party and party, and not to cases wherein the public peace is concerned, which are between the king and the party; and therefore a person may be apprehended going to or returning from divine service, by a warrant from a justice of the peace, it being for a breach of the peace, and for the king; and so in like cases (*y*).

Thus, in the case of *Pit v. Webley*, E., 11 Jac. 1 (*z*), Pit had a warrant from a justice of the peace, and served it upon Webley, as he was coming from church from sermon, upon a week day. Whereupon Webley libelled against him in the spiritual court; and Pit moved for a prohibition, and framed the suggestion upon these statutes, which prohibit arrests in time of divine service, and in going and returning to and from the church. But it was said that those statutes are where the matters are betwixt one common person and another, but not where it concerns the king and a common person, as here it did, this arrest being made at the king's suit. And to this opinion the court seemed to incline, and that there was just cause for a prohibition. But further day being given, the parties in the mean while agreed.

Against the Liberties of Holy Church.]—By which it appears that these statutes are but an affirmance of the common law, and in maintenance of the liberties of holy church (*a*).

And thereof be duly convict.]—The party grieved may have

(*u*) Degge, p. 1, c. 11.

(*x*) 12 Co. 100; 2 Bulst. 72.

(*y*) Wats, c. 34.

(*z*) Cro. Jac. 321.

(*a*) 12 Co. 100.

an action upon the statute; for when any thing is prohibited by an act, although the act doth not give an action, yet action lieth upon it (*b*).

And if an arrest be made contrary to these statutes, and the person arresting doth presently discharge the person arrested upon pretence of ignorance, or the like, this will not excuse the contempt in making the arrest (*c*).

However, if such undue arrest be made, the arrest is good; so that if a rescous be made, and thereby any person killed, the killing is murder (*d*).

And Dr. Watson says, he that doth offend against the afore-said statutes, may not only be fined in the temporal court, but also may be excommunicated by the ecclesiastical judge, and condemned in costs (*e*).

[By the common law, *eundo, morando aut redeundo* from divine service, he cannot be arrested (*f*). See *ante*, p. 266.—ED.]

By the statute 13 Edw. 1, st. 4, it is thus enacted: "For laying violent hands on a clerk, it hath been granted, that it shall be tried in a spiritual court, when money is not demanded, but a thing done for punishment of sin. And hereof the spiritual judge shall have power to take knowledge notwithstanding the king's prohibition."

Laying violent Hands on a Clerk.

And by the 9 Edw. 2, c. 3, "If any lay violent hands on a clerk, amends for the peace broken shall be before the king, and for the excommunication before a prelate, that penance corporal may be enjoined; which if the offender will redeem of his own good will, by giving money to the prelate, or to the party grieved, it shall be required before the prelate, and the king's prohibition shall not lie." [Though it be for ignorance, and he is afterwards discharged, he may be sued for it in the ecclesiastical court, and shall pay costs (*g*).—ED.]

Lay violent Hands.]—A prohibition having been granted, where a clerk libelled against another in the spiritual court, for that he beat him, or at leastwise assaulted him with a bill, and would have stricken him, and called him goose, and woodcock, and many such words; the court held, that the prohibition did well lie: for although for the *laying violent hands* on a clerk, the suit ought to be in the spiritual court, yet for an assault only, the suit ought to be at the common law (*h*).

So also where a prohibition was granted to stay process in the spiritual court against one, who, seeing an assault made upon his servant by a clerk, came in aid of his servant, and laid his hands peaceably upon the clerk; Gawdy, Chief Justice, held, that this case was out of these statutes, because the

(*b*) 12 Co. 100.

(*c*) Wats. ch. 34.

(*d*) Ibid.

(*e*) Ibid.

(*f*) [12 Co. 100; 2 Bulst. 72.]

(*g*) [2 Bulst. 72, cited by Comyns in his Digest, tit. Ecclesiastical Persons, (D), What Privileges belong to Ecclesiastical Persons.]

(*h*) Cro. El. 753.

party had good cause to beat the clerk: and the prohibition stood (i).

So also, if a clergyman be arrested by process of law, he cannot for this sue in the ecclesiastical court (j).

The Amends for the Peace broken shall be before the King.—If the clerk sue in Court Christian for damages for the battery, he is in case of *præmunire*; for in that case the ecclesiastical judge ought to proceed, *ex officio*, only to correct the sin (k).

And though he do not directly sue for such damages there, yet, if a man is excommunicate for laying violent hands on a clerk, and the spiritual court deny absolution till amends be made to the party for the battery, a prohibition will be granted (l).

And for the Excommunication before a Prelate.—This is the known punishment assigned to that crime by the canon law, to which the practice of the Church of England has been conformable, both before and since the Reformation (m).

It shall be required before the Prelate, and the King's Prohibition shall not lie.—Or in case the money for redeeming of penance is sued for in the spiritual court, and a prohibition is granted by the temporal, then a writ of consultation is provided for relief of the party (n).

Shall have
the Benefit of
Clergy more
than once.

He that is within orders hath a privilege, that albeit he have had the privilege of his clergy for a felony, he may have his clergy afterwards again, and so cannot a layman: and he that is within orders, and hath his clergy allowed, shall not be branded in the hand. And these privileges are given by act of parliament (o).

[By s. 6 of 7 & 8 Geo. 4, c. 27, the benefit of clergy is abolished in all cases of felony.—ED.]

And although a clergyman in orders shall not be burnt in the hand, yet after his discharge given by the court, he shall have the same privilege as if he had been burnt in the hand; and therefore shall not be drawn in question in the ecclesiastical court, to deprive him, or inflict any ecclesiastical censure upon him (p). [See title *Benefit of Clergy*.]

Exempted
from serving
on Juries.

Cannot be an
Approver.

Such as be within orders of the ministry, or clergy, cannot be empannelled as jurors (q).

It seems to be agreed, that a person in holy orders cannot be an approver; because it is a rule, that no member of the clergy can sue any appeal whatsoever in a matter or cause of death (r).

May counter-
plead the
waging of
Battel.

A clergyman being an appellant, the defendant cannot wage

(i) Cro. El. 655.

(j) 2 Inst. 492.

(k) Ibid.

(l) Gibs. 9.

(m) Ibid.

(n) Ibid.

(o) 2 Inst. 637; 2 H. H. 389.

(p) 2 H. H. 389.

(q) Lamb. Just. 396; *Beecher's case*, 4 Leon. 190.

(r) 2 Haw. 205.

his battel ; but the clerk being appellant may counterplead the wager of battel, and compel the appellee to put himself upon his country (s).

[Wager of battle is abolished by 59 Geo. 3, c. 42, as wager of law is by 3 & 4 Will. 4, c. 42 (t).—ED.]

By the 9 Hen. 3, c. 14, "No man of the church shall be amerced after the quantity of his spiritual benefice, but after his lay tenement and after the quantity of his offence."

Shall not be amerced after the Quantity of his Spiritual Benefice.

Amerced.—Here appeareth a privilege of the church, that if an ecclesiastical person be amerced (though amerciements belong to the king) yet he shall not be amerced in respect of his ecclesiastical promotion or benefice, but in respect of his lay fee, and according to the quantity of his fault, which is to be affeered (u).

Benefice.—Benefice is a large word, and is taken for any ecclesiastical promotion, or spiritual living whatsoever (v).

Lay-tenement.—And if a spiritual person be amerced above the quantity of his lay-tenement, he shall have a writ to prohibit the levying of it (x).

[By 1 & 2 Vict. c. 106, s. 36, it is enacted, "That from and after the decease of any spiritual person holding any benefice to which a house of residence is annexed, and in which he shall have been residing at the time of his decease, it shall be lawful for the widow of such spiritual person to occupy such house for any period not exceeding two calendar months after the decease of such spiritual person, holding and enjoying therewith the curtilage and garden belonging to such house."—ED.]

Widow of any Spiritual Person may continue in the House of Residence for Two Months, &c.

By the 1 Edw. 3, st. 2, c. 10, "Whereas archbishops, bishops, abbots, priors, abbesses and prioresses, have been sore grieved by the requests of the king and his progenitors, which have desired them by great threats, for their clerks and other servants, for great pensions, prebends, churches, and corrodies, so that they could nothing give nor do to such as had done them service, nor to their friends, to their great charge and damage ; the king granteth, that from henceforth he will no more such things desire, but where he ought."

How far subject to Pension or Services to the King.

But where he ought.—For, of common right, the king, as founder of archbishoprics, bishoprics, and many religious houses, had a corrody, or a pension, in the several foundations ; a corrody, for his vadelets, who attend them ; and a pension, for a chaplain, such as he should specially recommend, till the respective possessor should promote him to a competent benefice (y).

If any ecclesiastical person shall be in fear or doubt, that his goods or chattels or beasts, or the goods of his farmer,

(s) 2 Haw. 427.

(t) [See Stephen on Pleading, 85.]

(u) 2 Inst. 29.

(v) Ibid.

(x) Gibs. 13 ; Mag. Cart. c. 14 ;

Reg. f. 184 b.

(y) Gibs. 16.

should be taken by the ministers of the king, for the business of the king, he may purchase a protection (z).

No demean or proper cart for the necessary use of any ecclesiastical person, ought to be taken for the king's carriage; but they are exempted by the ancient law of England from any such carriage: and this was an ancient privilege belonging to holy church (a).

But there is no special exemption in the yearly mutiny acts, for clergymen, in respect of the soldiers' carriages.

[And by the latest statute on this subject, c. 31 of 9 Geo. 4, it is enacted as follows:

Arresting a
Clergyman
during Divine
Service.

[Sect. 23. "That if any person shall arrest any clergyman upon any civil process, while he shall be performing divine service, or shall, with the knowledge of such person, be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall suffer such punishment, by fine or imprisonment, or by both, as the court shall award."—ED.]

III. Sheriff cannot levy of his ecclesiastical Goods, and as to Distresses.

The Sheriff
cannot levy
of his eccle-
siastical
Goods.

The Writ
must be to
the Bishop.

If a person be bound in a recognizance in the chancery or other court, and he pay not the sum at the day; by the common law, if the person had nothing but ecclesiastical goods, the recognizee could not have had a *levari facias* to the sheriff to levy the same of these goods, but the writ ought to be directed to the bishop of the diocese to levy the same of his ecclesiastical goods (b). And an attachment will go against the chancellor for not returning it (c). It has been decided, that the assignees under an insolvent act are not entitled to demand and receive the profits of an ecclesiastical benefice, which have accrued subsequent to the assignment, nor can they maintain an action for the same, though included in the schedule of the insolvent (d).

In an action brought against a person, wherein a *capias* lieth (for example, an account), the sheriff returns that he is a *clergyman beneficed having no lay fee* in which he may be summoned; in this case the plaintiff cannot have a *capias* to the sheriff to take the body of the person, but he shall have a writ to the bishop, to cause the person to come and appear. But if he had returned, that he is a *clergyman having no lay fee*, then is a *capias* to be granted to the sheriff; for that it appeared not by the return that he had a benefice, so as he might be warned by the bishop his diocesan; and no man can be exempt from justice (e).

(z) 2 Inst. 4.

(a) 2 Inst. 35.

(b) 2 Inst. 4.

(c) 1 Wils. 332.

(d) *Arbuckle v. Cowtan*, 3 Bos. & Pul. 321.

(e) 2 Inst. 4. [See title *Sequestration*.]

M., 9 Will., *Moseley v. Warburton* (f). On a fieri facias against Warburton, a fellow of Winchester College, the sheriff returned, that he is a *clergyman beneficed having no lay fee*. Hereupon, a *fieri facias* was issued to the bishop, to levy the same of his ecclesiastical goods. The bishop sent his mandate to the warden and fellows of the college to sequester his salary. They answer that they have not power to do it. The bishop moved the court to know whether he might compel them by ecclesiastical censures. By Holt, Chief Justice:—If a prebendary hath a sole body, the bishop, upon a *levari facias* of his ecclesiastical goods, may sequester it; but if he hath but a body aggregate with the dean and chapter, he cannot sequester it. In this case, the profits of the fellowship are but casual dividends, in which before division Warburton hath no interest, so that they do not make an estate; and it seems in this case Warburton is not a clerk beneficed, and the bishop may return that he hath no ecclesiastical goods.

Fellow of a College is not a beneficed Clerk.

Articuli Cleri, 9 Edw. 2, st. 1, c. 9, it is complained, that the king's officers, as sheriffs and other, do enter into the fees of the church to take distresses, and sometimes they take the parson's beasts in the king's highway, where they have nothing but the land belonging to the church. Answer:—The king's pleasure is, that from henceforth such distresses shall neither be taken in the king's highway, nor in the fees wherewith churches in times past have been endowed; nevertheless, he willeth distresses to be taken in possessions of the church newly purchased by ecclesiastical persons.

Distresses not to be taken in the Fees of the Church.

Fees of the Church.]—That is, lands belonging to the church (g).

Parsons.]—Here parsons (*rectores*) be named but for example; for this law extendeth to other ecclesiastical persons (h).

From henceforth such Distresses shall not be taken.]—Notwithstanding that the king's officers, as sheriffs and others, are mentioned in the complaining part, yet Lord Coke says, this law bindeth not the king, when he is party, for any debt or duty due unto him, because the distress or other process for the king is not expressly named (in the enacting part), but distresses generally. And this appeareth, he says, by a book case (i): A prior brought a bill of trespass against the sheriff for entering into his sanctuary, that is, within the circuit of the site of his priory, and took away his beasts. The defendant said, that he was sheriff, and that the prior lost issues in the Court of Common Pleas, and a writ issued to him to levy the issues, and that he entered into the sanctuary because he could not find a distress without. Whereupon the plaintiff demurred, and judgment was given against the plaintiff. Which proveth

(f) Ld. Raym. 265; 1 Salk. 320;

(h) 2 Inst. 627.

[2 Inst. 4.]

(i) 27 Ass. p. 66.

(g) Lind. 268.

that the sheriff in that case could not have returned, upon the process to him directed, that he is a clerk beneficed having no lay fee (*k*). Nevertheless, the words are, that *such* distresses (*quod districtiones hujusmodi*) shall not be taken, which manifestly refer to the complaint preceding.

Shall neither be taken.]—And if they be taken, the party aggrieved may have a writ for his relief (*l*).

Have been endowed.]—This is to be taken in a large sense, for here the fees that they have by reason of their foundation, or by reason of their dotation or endowment, are included (*m*).

Endowed.]—The possessions of the church are the endowment of the church, and they are accounted as tenants in dower (*n*).

Possessions of the Church newly purchased by ecclesiastical Persons.]—Concerning tasks, tenths and fifteenths granted by parliament to the king, the possessions of ecclesiastical persons, which they acquired since the 20 Edw. 1, either by purchase or act in law, were chargeable thereunto; but those which they had at that time were not charged therewith. And the reason thereof was this:—The pope (after the example of the high priest among the Jews, who had of the Levites the tenth part of the tithe), claimed by pretext thereof a yearly tenth part of the value of all ecclesiastical livings. This portion or tribute was by ordinance yielded to the pope in 20 Edw. 1, and a valuation then made of the ecclesiastical livings within this realm, to the end the pope might know, and be answered of that yearly revenue, so as the ecclesiastical livings, chargeable with that tenth (which was called spiritual) to the pope, were not chargeable with the temporal tenths or fifteenths granted to the king in parliament, lest they should be doubly charged; but their possessions acquired after that taxation were liable to the temporal tenths or fifteenths, because they were not charged to the other (*o*).

Newly purchased.]—In which the temporal lords had a right of distraining, which right they ought not to lose, by the possessions coming into the hands of ecclesiastical persons. For where any burden real lieth upon any land or place, the thing itself passeth with its burden (*p*).

Purchased.]—Either to their own use, or to the use of the church (*q*).

If any ecclesiastical person knowledge a statute merchant or statute staple, or a recognizance in the nature of a statute staple; his body shall not be taken by force of any process thereupon (*r*).

Shall not be
taken on a
Statute Mer-
chant or
Staple.

(*k*) 2 Inst. 627.

(*l*) Gibs. 15.

(*m*) 2 Inst. 627.

(*n*) 2 Inst. 627.

(*o*) Ibid.

(*p*) Lind. 268.

(*q*) Lind. 261.

(*r*) 2 Inst. 4.

IV. *Freedom from Tolls, &c.*

Amongst the Saxons, the lands of the clergy were charged to castles, bridges and expeditions (s). Free from Tolls and other Charges by the Common Law.

But after the introduction of the Romish canon law, they obtained exemptions.

And Lord Coke says, that ecclesiastical persons ought to be quit and discharged of tolls and customs, avirage, pontage, paviage, and the like, for their ecclesiastical goods; and if they be molested therefore, they may have a writ for their discharge (t).

Which writ they may have out of the Chancery made of course without petition or motion, directed to the party that distrains or disturbs them for any of these things, commanding them to desist; and if such writ be not obeyed, the cursitor of course will make out an *alias* and *pluries*, and if none of these will be obeyed, an attachment to arrest the party, and detain him till he obey (u).

But this and the like are always to be understood with this exception, viz. provided that no act of parliament hath ordered otherwise.

Anciently, indeed, it was held, that clergymen are not to be burdened in the general charges with the laity of this realm, neither to be troubled or incumbered, unless they be specially named and expressly charged by some statute (x). Not freed from general Charges by Act of Parliament.

Thus Dr. Godolphin observes, that the statute of *hue and cry* charges the *inhabitants and resiants*, but it hath never been taken, says he, that parsons and vicars are included, or shall be contributory in robberies. In the same statute are *watchings*, yet the clergy thereby are never charged. The statute for *highways* charged every *householder*, yet this hath never been taken by usage to charge the clergy. Also, the charge of *gaols*, the act says all *resiants* shall pay; yet have the clergy never been charged. Thus, where the *bridge* act says, *all inhabitants* shall be assessed, it must mean only all such only as are chargeable to pontage (y).

But now the contrary doctrine prevails, that clergymen are liable to all charges by act of parliament, unless they are specially exempted.

Thus they are, both in respect of their tithes and glebes, liable to contribute to watch and ward, to the repair of the highways, and may be rated or taxed by the commissioners of sewers; they, as well as laymen, are chargeable to the poor maimed soldiers or poor prisoners, county rates, and shall contribute towards satisfying for a robbery committed within the

(s) Wake's State of the Ch. 2.

(t) 2 Inst. 3.

(u) Degge, p. 1, c. 11.

VOL. III.

(x) God. Rep. 194. [See title Convocation.]

(y) God. Rep. 194, 5.

A A

hundred, and all other public charges imposed by act of parliament. And this hath been resolved upon debate, as Hale, Chief Justice, said, before all the judges, T., 27 Car. 2, in the case of *Webb v. Batchelor* (z).

And particularly in the case of *bridges*, the statute of the 22 Hen. 8, says, the justices of the peace shall assess *every inhabitant* towards their repair; by which words, *every inhabitant*, Lord Coke says, all privileges of exemptions or discharges whatsoever from contribution (if any were) are taken away, although the exemption were by act of parliament (a).

And in respect of the *highways*, where the statutes direct that the *parishioners of every parish* shall repair, Mr. Hawkins observes thereupon, that persons in holy orders are within the purview of these statutes in respect of their spiritual possessions, as much as any other persons whatsoever, in respect of any other possessions; for the words are general, and there is no kind of intimation that any particular persons shall be exempted more than others (b).

[The clergy are exempted from paying toll at turnpike gates when on parochial duty (c).—ED.]

V. Apparel, &c.

Apparel.

The *canonical* habit (properly speaking) is that which is enjoined by the canons of the church. But in a matter so fluctuating as that of dress, it is impossible to lay down rules for apparel in one age which will not appear ridiculous in the next. In such case the general rule can only be, that clergymen shall appear in habit and dress such as shall comport with gravity and decency, without effeminacy or affectation.

The canons for the habit of clergymen are chiefly these two that follow, which for the reason above mentioned are now become matters only of curiosity and speculation.

Apparel under the old Constitutions.

By a constitution of Archbishop Stratford, in the year 1343, in the reign of King Edward the Third, the outward habit often shows the inward disposition; and though the behaviour of the clergy ought to be the instruction of the laity, yet the prevailing excesses of the clergy as to tonsure, garments and trappings, give abominable scandal to the people; because such as have dignities, parsonages, honourable prebends and benefices with cure, and even men in holy orders, scorn the tonsure (which is the mark of perfection and of the heavenly kingdom) and distinguish themselves with hair hanging down to their shoulders, in an effeminate manner, and apparel themselves like soldiers rather than clerks, with an upper jump re-

(z) Wats. ch. 40; 3 Keb. 255, 476; 1 Ventr. 273; 2 Lev. 139.

(a) 2 Inst. 704.

(b) 1 Haw. 204.

(c) [The Turnpike Acts are, 3 Geo. 4, c. 126; 1 & 2 Will. 4, c. 25.]

markably short, with excessive wide or long sleeves, not covering the elbows, but hanging down; their hair curled and powdered, and caps with tippets of a wonderful length; with long beards; and rings on their fingers; girt with girdles exceedingly large and costly, having purses enamelled with figures and various sculptures gilt, hanging with knives (like swords) in open view; their shoes chequered with red and green, exceeding long, and variously indented; with croppers to their saddles, and horns hanging at the necks of their horses; and cloaks furred on the edges, contrary to the canonical sanctions, so that there is no distinction between clerks and laics, which rendereth them unworthy of the privilege of their order: we therefore, to obviate these miscarriages, as well of the masters and scholars within the universities of our province as of those without, with the approbation of this sacred council, do ordain, that all beneficed men, those especially in holy orders, in our province, have their tonsure as comports with the state of clergymen; and if any of them do exceed by going in a remarkably short and close upper garment, with long or unreasonably wide sleeves, not covering the elbow, but hanging down, with hair unclipped, long beards, with rings on their fingers in public (excepting those of honour and dignity), or exceed in any particular before expressed; such of them as have benefices, unless within six months time they shall effectually reform upon admonition given, shall incur suspension from their office *ipso facto*, and if they continue under it for three months, they shall from that time be suspended from their benefice *ipso jure* without any further admonition; and they shall not be absolved from this sentence by their diocesans till they pay the fifth part of one year's profit of their benefices to be distributed to the poor. If they be unbeneficed, they shall be disabled from obtaining a benefice for four months. And such as are students in the universities, and pass for clerks, if they do not effectually abstain from the premisses, shall be *ipso facto* disabled from taking any ecclesiastical degrees or honours in those universities, till by their behaviour they give proof of their discretion as becometh scholars. Yet by this constitution we intend not to abridge clerks of open wide surcoats, called table coats, with fitting sleeves to be used at seasonable times and places; nor of short and close garments, whilst they are travelling in the country, at their own discretion (*d*).

Tonsure.]—This signifieth sometimes not only the shaved spot on the crown of the head, but the whole ecclesiastical cut, or having the hair clipped in such a fashion that the ears might be seen, but not the forehead (*e*).

Surcoats.]—Made to save better clothes, especially in eating and drinking at home (*f*).

(*d*) Lind. 122; Johns. Stratf.

(*e*) Johns. Stratf.

(*f*) Lind. 124.

Apparel under the Canons of 1603.

And by the 74th canon of the Canons in the year 1603, archbishops and bishops shall use the accustomed apparel of their degrees: deans, masters of colleges, archdeacons and prebendaries in cathedral and collegiate churches (being priests or deacons) doctors in divinity, law and physic, bachelors in divinity, masters of arts and bachelors of law, having any ecclesiastical living, shall usually wear gowns with standing collars and sleeves straight at the hands or wide sleeves, as is used in the universities, with hoods or tippets of silk or sarcelin, and square caps. And all other ministers shall also usually wear the like apparel as is aforesaid, except tippets only. And all the said ecclesiastical persons above mentioned shall usually wear in their journies cloaks with sleeves, commonly called priest's cloaks, with guards, welts, long buttons, or cuts. And no ecclesiastical person shall wear any coif or wrought night-cap, but only plain night-caps of black silk, satin, or velvet. In private houses, and in their studies, the said persons ecclesiastical may use any comely and scholarlike apparel, provided that it be not cut or pinked, and in public not to go in their doublet and hose, without coats or cassocks. And not to wear any light coloured stockings. Poor beneficed men and curates (not being able to provide themselves long gowns) may go in short gowns of the fashion aforesaid.

The Band.

Particularly the *band*, we may observe, is no part of the canonical habit, being not so ancient as any canon of the church. Archbishop Laud is pictured in a ruff, which was worn at that time both by clergymen and gentlemen of the law; as also long before, during the reigns of King James the First, and of Queen Elizabeth. The band came in with the puritans and other sectaries upon the downfall of episcopacy, and in a few years afterwards became the common habit of men of all denominations and professions; which giving way in its turn was yet retained by the gentlemen of the long robe (both ecclesiastical and temporal) only because they would not follow every caprice of fashion. Indeed, most of the peculiar habits, both in the church and in courts of justice, and in the universities, were in their day the common habit of the nation, and were retained by persons and in places of importance only as having an air of antiquity, and thereby in some sort conducing to attract veneration; and the same on the other hand in proportion do persuade to a suitable gravity of demeanor; for an irreverent behaviour in a venerable habit is extremely burlesque and ungraceful.

Shunning vicious Excesses.

By Can. 75, no ecclesiastical persons shall at any time, other than for their honest necessities, resort to any tavern or alehouses, neither shall they board or lodge in any such places. Furthermore, they shall not give themselves to any base or servile labour, or to drinking, or riot, spending their time idly by day or by night, playing at dice, cards, or tables,

or any other unlawful game. But at all times convenient, they shall hear or read somewhat of the holy scriptures, or shall occupy themselves with some other honest study or exercise, always doing the things which shall appertain to honesty, and endeavouring to profit the church of God, having always in mind, that they ought to excel all others in purity of life, and should be examples to the people to live well and christianly, under pain of ecclesiastical censures to be inflicted with severity, according to the qualities of their offences.

Nevertheless, Lord Coke says, by the common law of the land, clergymen may use reasonable recreations, in order to make them fitter for the performance of their duty and office (*f*). Recreations.

And albeit spiritual persons (he says) are prohibited, by the canon law, to hunt; yet by the common law they may use the recreation of hunting. And after the decease of every archbishop and bishop (amongst other things) the king, time out of mind, hath had his kennel of hounds, or a composition for the same (*g*).

The foundation of which custom was this: it appeareth by many records, that by the law and custom of England, no bishop could make his will of his goods or chattels coming of his bishopric, without the king's licence. Whereupon the bishops, that they might freely make their wills, yielded to give to the king after their deceases respectively for ever six things: 1. Their best horse or palfrey, with bridle and saddle. 2. A cloak with a cape. 3. One cup with a cover. 4. One bason and ewer. 5. One ring of gold. 6. Their kennel of hounds (*h*). Bishop's Will.

VI. Punishment of Criminous Clerks.

[In the form of consecration in the Book of Common Prayer one of the questions put by the archbishop to the candidate for episcopacy, is:—

[“THE ARCHBISHOP.—*Will you maintain and set forward as much as shall lie in you, quietness, love and peace, among all men; and such as are unjust, disobedient and criminous, within your diocese, correct and punish according to such authority as you have by God's word, and as to you shall be committed by the ordinance of this realm?*”

[“ANSWER.—*I will do so, by the help of God.*”

By the 1 Hen. 7, c. 4, it shall be lawful to all archbishops and bishops, and other ordinaries having episcopal jurisdiction, to punish and chastise priests, clerks, and religious men, as shall be convicted before them by examination, and other lawful proof requisite by the law of the church, of advoutry, fornication, incest, or any other fleshly incontinency, by committing them to ward and prison, there to abide for such time

Might have been imprisoned by the Spiritual Judge for Incontinence.

(*f*) 2 Inst. 309.

(*g*) Ibid.

(*h*) Ibid. 338.

as shall be thought to their discretions convenient for the quality and quantity of their trespass.

Present mode
of punishing
delinquent
Clerks.

[But on the 9th of August, 1840, was passed the 3 & 4 Vic. c. 86, entitled, "An Act for better enforcing Church Discipline," and which, proclaiming in its preamble that the *manner of proceeding in causes for the correction of clerks* required amendment, repealed the foregoing statute of Henry the Seventh, (the continuance of which up to the present period was not a little extraordinary), and then enacted as follows:

3 & 4 Vict.
c. 86.

Definition of
the terms

"Preferment,"

"Bishop,"

"Archbishop," and

"Diocese,"

[" 2. That, unless it shall otherwise appear from the context, the term 'preferment,' when used in this act, shall be construed to comprehend every deanery, archdeaconry, prebend, canonry, office of minor canon, priest vicar, or vicar choral in holy orders (*i*), and every precentorship, treasurer'ship, sub-deanery, chancellorship of the church, and other dignity and office in any cathedral or collegiate church, and every mastership, wardenship, and fellowship in any collegiate church, and all benefices with cure of souls, comprehending therein all parishes, perpetual curacies, donatives, endowed public chapels, parochial chapelries, and chapelries or districts belonging to or reputed to belong, or annexed or reputed to be annexed, to any church or chapel, and every curacy, lectureship, readership, chaplaincy, office, or place which requires the discharge of any spiritual duty, and whether the same be or be not within any exempt or peculiar jurisdiction; and the word 'bishop,' when used in this act, shall be construed to comprehend 'archbishop;' and the word 'diocese,' when used in this act, shall be construed to comprehend all places to which the jurisdiction of any bishop extends under and for the purposes of an act passed in the second year of the reign of her present Majesty, intituled, 'An Act to abridge the holding of Benefices in Plurality, and to make better Provision for the Residence of the clergy (*k*).']

as used in
1 & 2 Vict.
c. 106.

Bishop may
issue a
Commission
of Inquiry.

[" 3. That in every case of any clerk in holy orders of the United Church of England and Ireland who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission under his hand and seal to five persons, of whom one shall be his vicar general, or an archdeacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or

Members of
such Com-
mission.

(*i*) [All the vicars choral of St. Paul's are laymen, and so are many of them in other cathedrals: these, therefore, it would seem, must still remain under the control of the visitor. In 1716, the dean and chapter of York passed sentence of deprivation on a vicar choral who was in holy orders, an appeal was prosecuted to the Archbishop of York, as visitor, and to the Court of Delegates. Both

these tribunals confirmed the original sentence of the dean and chapter. See titles **Dean and Chapter** and **Visitation**, and printed Catalogue of Processes in the Registry of the High Court of Delegates from 1609 to 1823, p. 45, n. 801, *Boughton, Vicar Choral in York Cathedral*.—Ed.]

(*k*) [See s. 22 of this act, and also the title **Peculiars**.—Ed.]

report: provided always, that notice of the intention to issue such commission under the hand of the bishop, containing an intimation of the nature of the offence, together with the names, addition, and residence of the party on whose application or motion such commission shall be about to issue, shall be sent by the bishop to the party accused fourteen days at least before such commission shall issue.

3 & 4 Vict.
c. 86.

What Notice
must be pre-
viously given.

[“ 4. That it shall be lawful for the said commissioners or any three of them to examine upon oath, or upon solemn affirmation in cases where an affirmation or declaration is allowed by law instead of an oath, which oath or affirmation or declaration respectively shall be administered by them to all witnesses who shall be tendered to them for examination as well by any party alleging the truth of the charge or report as by the party accused, and to all witnesses whom they may deem it necessary to summon for the purpose of fully prosecuting the inquiry, and ascertaining whether there be sufficient *prima facie* ground for instituting further proceedings; and notice of the time when and place where every such meeting of the commissioners shall be holden shall be given in writing under the hand of one of the said commissioners to the party accused seven days at least before the meeting; and it shall be lawful for the party accused, or his agent, to attend the proceedings of the commission, and to examine any of the witnesses; and all such preliminary proceedings shall be public, unless, on the special application of the party accused, the commissioners shall direct that the same or any part thereof shall be private; and when such preliminary proceedings, whether public or private, shall have been closed, one of the said commissioners shall, after due consideration of the depositions taken before them, openly and publicly declare the opinion of the majority of the commissioners present at such inquiry, whether there be or be not sufficient *prima facie* ground for instituting further proceedings.

Proceedings
of the Com-
missioners.

[Sect. 5. “That the said commissioners or any three of them shall transmit to the bishop under their hands and seals, the depositions of witnesses taken before them, and also a report of the opinion of the majority of the commissioners present at such inquiry whether or not there be sufficient *prima facie* ground for instituting proceedings against the party accused; and such report shall be filed in the registry of the diocese; and that if the party accused shall hold any preferment in any other diocese or dioceses, the bishop to whom the report shall be made shall transmit a copy thereof, and of the depositions, to the bishop or bishops of such other diocese or dioceses, and shall also upon the application of the party accused, cause to be delivered to such party a copy of the said report and of the depositions, on payment of a reasonable sum for the same, not exceeding two-pence for each folio of ninety words.”

Report of
the Commis-
sioners.

[Sect. 6. “That in all cases where proceedings shall have been commenced under this act against any such clerk, it shall be lawful for the bishop of any diocese within which such clerk may hold any preferment, with the consent of such clerk and of the party complaining, if any, first obtained in writing, to pronounce, without any further proceedings, such sentence as the said bishop shall think fit,

Bishop may
pronounce
Sentence, by
Consent,
without fur-
ther Pro-
ceedings.

3 & 4 Viet.
c. 86.

Articles and
Depositions
to be filed.

Service of
Copy of the
Articles on
the Party.

Bishop may
require the
Party to ap-
pear before
him ;

and may
pronounce
Judgment on
admission.

How Notice
and Requi-
sition to be
served.

Proceedings
on a hearing
before the
Bishop.

not exceeding the sentence which might be pronounced in due course of law ; and all such sentences shall be good and effectual in law as if pronounced after a hearing, according to the provisions of this act, and may be enforced by the like means (*l*)."

[Sect. 7. "That if the commissioners shall report that there is sufficient *prima facie* ground for instituting proceedings, and if the bishop of any diocese within which the party accused may hold any preferment, or the party complaining shall thereupon think fit to proceed against the party accused, articles shall be drawn up, and, when approved and signed by an advocate practising in Doctors Commons, shall, together with a copy of the depositions taken by the commissioners, be filed in the registry of the diocese of such last-mentioned bishop ; and any such party, or any person on his behalf, shall be entitled to inspect without fee such copies, and to require and have, on demand, from the registrar (who is hereby required to deliver the same), copies of such depositions, on payment of a reasonable sum for the same, not exceeding two-pence for each folio of ninety words."

[Sect. 8. "That a copy of the articles so filed shall be forthwith served upon the party accused, by personally delivering the same to him, or by leaving the same at the residence house belonging to any preferment holden by him, or if there be no such house, then at his usual or last known place of residence ; and it shall not be lawful to proceed upon any such articles until after the expiration of fourteen days after the day on which such copy shall have been so served."

[Sect. 9. "That it shall be lawful for the said last-mentioned bishop, by writing under his hand, to require the party to appear, either in person or by his agent duly appointed, as to the said party may seem fit, before him at any place within the diocese, and at any time after the expiration of the said fourteen days, and to make answer to the said articles within such time as to the bishop shall seem reasonable ; and if the party shall appear, and by his answer admit the truth of the articles, the bishop, or his commissary specially appointed for that purpose, shall forthwith proceed to pronounce sentence thereupon according to the ecclesiastical law."

[Sect. 10. "That every notice and requisition to be given or made in pursuance of this act, shall be served on the party to whom the same respectively relate in the same manner as is hereby directed with respect to the service of a copy of the articles on the party accused."

[Sect. 11. "That if the party accused shall refuse or neglect to appear and make answer to the said articles, or shall appear and make any answer to the said articles other than an unqualified admission of the truth thereof, the bishop shall proceed to hear the cause, with the assistance of three assessors, to be nominated by the bishop, one of whom shall be an advocate who shall have practised not less than five years in the court of the archbishop of the province, or a sergeant at law, or a barrister of not less than seven years standing, and another shall be the dean of his cathedral church, or

(*l*) [Since the passing of this act this clause has been on several occasions carried into execution : at present no opportunity has occurred for trying the whole machinery of the statute.—ED.]

of one of his cathedral churches, or one of his archdeacons, or his chancellor; and upon the hearing of such cause the bishop shall determine the same, and pronounce sentence thereupon according to the ecclesiastical law."

3 & 4 Vict.
c. 86.

[Sect. 12. "That all sentences which shall be pronounced by any bishop or his commissary in pursuance of this act shall be good and effectual in law, and such sentences may be enforced by the like means as a sentence pronounced by an ecclesiastical court of competent jurisdiction."

Sentence of
Bishop to be
effectual in
Law.

[Sect. 13. "That it shall be lawful for the bishop of any diocese within which any such clerk shall hold any preferment, or if he hold no preferment, then for the bishop of the diocese within which the offence is alleged to have been committed, in any case, if he shall think fit, either in the first instance or after the commissioners shall have reported that there is sufficient *prima facie* ground for instituting proceedings, and before the filing of the articles, but not afterwards, to send the case by letters of request to the court of appeal of the province, to be there heard and determined according to the law and practice of such court: Provided always, that the judge of the said court may, and he is hereby authorized and empowered from time to time to make any order or orders of court for the purpose of expediting such suits or otherwise improving the practice of the said court, and from time to time to alter and revoke the same: Provided also, that there shall be no appeal from any interlocutory decree or order not having the force or effect of a definitive sentence, and thereby ending the suit in the court of appeal of the province, save by the permission of the judge of such court (m)."

Bishop may
send the
cause to the
Court of
Appeal of the
Province.

Judge of the
Court may
make Orders
for exped-
iting such
Suits.

No Appeal
from Inter-
locutory
Decree.

[Sect. 14. "That in every case in which, from the nature of the offence charged, it shall appear to any bishop within whose diocese the party accused may hold any preferment, that great scandal is likely to arise from the party accused continuing to perform the services of the church while such charge is under investigation, or that his ministration will be useless while such charge is pending, it shall be lawful for the bishop to cause a notice to be served on such party at the same time with the service of a copy of the articles aforesaid, or at any time pending any proceedings before the bishop or in any ecclesiastical court, inhibiting the said party from performing any services of the church within such diocese, from and after the expiration of fourteen days from the service of such notice, and until sentence shall have been given in the said cause: Provided that it shall be lawful for such party, being the incumbent of a benefice, within fourteen days after the service of the said notice, to nominate to the bishop any fit person or persons to perform all such services of the church during the period in which such party shall be so inhibited as aforesaid; and if the bishop shall deem the person or persons so nominated fit for the performance of such services he shall grant his licence to him or them accordingly, or in case a fit person shall not be nominated, the bishop

Bishop em-
powered to
inhibit Party
accused from
performing
Services of
the Church,
&c.

(m) It will be seen by sect. 24, that where the bishop is *patron* of the preferment of the accused party, the archbishop of the province may do all acts that the bishop might otherwise do; see note to sect. 24: and see sect. 15, for the power of the aggrieved party to appeal.—Ed.]

1 & 2 Vict.
c. 86.

shall make such provision for the service of the church as to him shall seem necessary ; and in all such cases it shall be lawful for the bishop to assign such stipend, not exceeding the stipend required by law for the curacy of the church belonging to the said party, nor exceeding a moiety of the net annual income of the benefice, as the said bishop may think fit; and to provide for the payment of such stipend, if necessary, by sequestration of the living : Provided also, that it shall be lawful for the said bishop at any time to revoke such inhibition and licence respectively."

What Appeals may be made by the aggrieved Party.

[Sect. 15. "That it shall be lawful for any party who shall think himself aggrieved by the judgment pronounced in the first instance by the bishop, or in the court of appeal of the province, to appeal from such judgment ; and such appeal shall be to the archbishop, and shall be heard before the judge of the court of appeal of the province, when the cause shall have been heard and determined in the first instance by the bishop, and shall be proceeded in in the said court of appeal in the same manner and subject only to the same appeal as in this act is provided with respect to cases sent by letters of request to the said court ; and the appeal shall be to the Queen in Council, and shall be heard before the Judicial Committee of the Privy Council when the cause shall have been heard and determined in the first instance in the court of the archbishop."

Archbishops and Bishops members of the Privy Council to be Members of the Judicial Committee on all Appeals under this Act.

[Sect. 16. "That every archbishop and bishop of the United Church of England and Ireland, who now is or at any time hereafter shall be sworn of her Majesty's most honourable privy council, shall be a member of the Judicial Committee of the privy council for the purpose of every such appeal as aforesaid ; and that no such appeal shall be heard before the Judicial Committee of the privy council, unless at least one of such archbishops or bishops shall be present at the hearing thereof: Provided always, that the archbishop or bishop who shall have issued the commission hereinbefore mentioned in any such case, or who shall have heard any such case, or who shall have sent any such case by letters of request to the court of appeal of the province, shall not sit as a member of the Judicial Committee on an appeal in that case."

Attendance of Witnesses, and Production of Papers, &c. may be compelled.

[Sect. 17. "That it shall be lawful in any such inquiry for any three or more of the commissioners, or in any such proceeding for the bishop, or for any assessor of the bishop, or for the judge of the court of appeal of the province, to require the attendance of such witnesses, and the production of such deeds, evidences or writings, as may be necessary ; and such bishop, judge, assessor, and commissioners respectively shall have the same power for these purposes as now belong to the Consistorial Court and to the Court of Arches respectively."

Witnesses to be examined on Oath, and to be liable to Punishment for Perjury.

[Sect. 18. "That every witness who shall be examined in pursuance of this act shall give his or her evidence upon oath, or upon solemn affirmation in cases where an affirmation is allowed by law instead of an oath, which oath or affirmation respectively shall be administered by the judge of the court or his surrogate, or by the assessor of the bishop, or by a commissioner ; and that every such witness who shall wilfully swear or affirm falsely shall be deemed guilty of perjury."

[Sect. 19. " Provided always, *that nothing hereinbefore contained shall prevent any person from instituting as voluntary promoter, or from prosecuting, in such form and manner and in such court as he might have done before the passing of this act, any suit which, though in form criminal, shall have the effect of asserting, ascertaining, or establishing any civil right, nor to prevent the archbishop of the province from citing any such clerk before him in cases and under circumstances in and under which such archbishop might, before the passing of this act, cite such clerk under and in pursuance of a statute passed in the twenty-third year of the reign of king Henry the Eighth, intituled ' An Act that no person shall be cited out of the diocese where he or she dwelleth, except in certain cases.' "*

3 & 4 Vict.
c. 86.

Provisions of
Act not to
interfere with
Persons insti-
tuting Suits
to establish a
civil Right.

23 Hen. 8,
c. 9.

[Sect. 20. " That every suit or proceeding against any such clerk in holy orders for any offence against the laws ecclesiastical shall be *commenced within two years after the commission of the offence in respect of which the suit or proceeding shall be instituted, and not afterwards*: Provided always, that whenever any such suit or proceeding shall be brought in respect of an offence for which a conviction shall have been obtained in any court of common law, such suit or proceeding may be brought against the person convicted at any time within *six calendar months* after such conviction, although more than two years shall have elapsed since the commission of the offence in respect of which such suit or proceeding shall be so brought."

Suits to be
commenced
within Two
Years.

Proviso.

[Sect. 21. " That the act passed in the twenty-seventh year of the reign of his late majesty King George the Third, intituled ' An Act to prevent frivolous and vexatious suits in the ecclesiastical courts,' does not and shall not extend to the time of the commencement of suits or proceedings against spiritual persons for any of the offences in the said act named."

27 Geo. 3, c. 44,
not to apply
to Suits
against Spi-
ritual Persons
for certain
Offences.

[Sect. 22. " That every archbishop and bishop within the limit of whose province or diocese respectively any place, district or preferment, exempt or peculiar, shall be locally situate, shall, except as herein otherwise provided, have, use, and exercise all the powers and authorities necessary for the due execution by them respectively of the provisions and purposes of this act, and for enforcing the same with regard thereto respectively, as such archbishop and bishop respectively would have used and exercised if the same were not exempt or peculiar, but were subject in all respects to the jurisdiction of such archbishop or bishop; and where any place, district, or preferment, exempt or peculiar, shall be locally situate within the limits of more than one province or diocese, or where the same, or any of them, shall be locally situate between the limits of the two provinces, or between the limits of any two or more dioceses, the archbishop or bishop of the cathedral church to whose province or diocese the cathedral, collegiate, or other church or chapel of the place, district, or preferment respectively shall be nearest in local situation, shall have, use and exercise all the powers and authorities which are necessary for the due execution of the provisions of this act, and enforcing the same with regard thereto respectively, as such archbishop or bishop could have used if the same were not exempt or peculiar, but were subject in all respects to the jurisdiction of such archbishop or bishop respectively, and

Power of
Archbishops
and Bishops
as to exempt
or peculiar
Places or
Preferments.

3 & 4 Vict.
c. 86.

No Suit to
be instituted
except as
herein pro-
vided.

If a Bishop is
Patron of the
Preferment
held by ac-
cused Party,
Archbishop
to act in his
stead.

Saving of
Archbishop
and Bishop's
Powers.

the same, for all the purposes of this act, shall be deemed and taken to be within the limits of the province or diocese of such archbishop or bishop; provided that the peculiars belonging to any archbishoprick or bishoprick, though locally situate in another diocese, shall continue subject to the archbishop or bishop to whom they belong, as well for the purposes of this act as for all other purposes of ecclesiastical jurisdiction."

[Sect. 23. "That no criminal suit or proceeding against a clerk in holy orders of the United Church of England and Ireland, for any offence against the laws ecclesiastical (*n*), shall be instituted in any ecclesiastical court otherwise than is herein-before enacted or provided" (*o*).

[Sect. 24. "That when any act, save (*p*) sending a case by letters of request to the court of appeal of the province, is to be done or any authority is to be exercised by a bishop under this act, such act shall be done or authority exercised by the archbishop of the province in all cases where the bishop who would otherwise do the act or exercise the authority is the patron of any preferment held by the party accused" (*q*).

[Sect. 25. "That nothing in this act contained shall be construed to affect any authority over the clergy of their respective provinces or dioceses which the archbishops or bishops of England and Wales may now according to law exercise personally and without process in court; and that nothing herein contained shall extend to Ireland."

[It will be seen by the 3rd and 23rd section of the foregoing act, that all offences against the laws ecclesiastical, by a Clerk in Holy Orders, are henceforth to be proceeded against according to the regulations prescribed by the act, and in no other

(*n*) [Although, as will be seen in the next note, this clause takes away the visitor's power of punishing an offence against the *general* law of the church, it would probably be held, that he would still be able to enforce the *particular* statutes of the cathedral subject to his visitation.—ED.]

(*o*) [This clause, according to a recent decision, has taken away any power which the ordinary *quà* visitor might have possessed of depriving a clerk *summariè et sine figurâ judicii*; and it was held not to be preserved by section 25. See the case of *The Dean of York v. Archbishop of York and Dr. Phillimore*, under title *Visitation*. But see also the case of *The Dean of Bath and Wells*, Dyer's Rep. 278.—ED.]

(*p*) [See sect. 13, and note. Two courses, then, it would appear, are open to a bishop who is patron of the preferment of the accused clerk.—1. To send it by letters of request to the court of the province. 2. To sub-

stitute, in the first instance, what may be called the *personal* authority (given by this act), of the archbishop in the place of his own.—ED.]

(*q*) [There does not seem to be any provision for a case where the archbishop is himself both patron of the preferment and ordinary of the party accused. The Court of Delegates were not capable of accepting letters of request, and it is presumed the Judicial Committee of the Privy Council are in the same condition. It would appear therefore, that there is a "*casus omissus*" in this statute, unless it be held that as by sect. 1 of this act, the word "bishop" is to comprehend "archbishop," the archbishop, when ordinary and patron, may send the case by letters of request to the judge of the Court of Appeal of the province, that is, send letters of request to his own chancellor. But this would appear to be a very forced and improbable construction of the act.—ED.]

way whatsoever. The mode of procedure before the passing of this act was by articles in the diocesan or peculiar court, or by letters of request to the court of the metropolitan. Any person, it has been held, may prosecute a clergyman for a neglect of his clerical duty. Nor have the marriage acts deprived the ordinary of the power of correcting any of his clergy who may offend against the order of the church in publishing banns, or solemnizing matrimony, in any other manner than that prescribed by law; and also, as it would seem, for refusing to solemnize a marriage after the preliminary conditions required by the law have been satisfied (*r*).

[VII. *As to Farming and Trafficking (s).*

[By 1 & 2 Vict. c. 106 (*t*), which consolidates the former statutes on this subject, it is enacted as follows:—

[Sect. 28. "That it shall not be lawful for any spiritual person holding any cathedral preferment or benefice, or any curacy or lectureship, or who shall be licensed or otherwise allowed to perform the duties of any ecclesiastical office whatever, to take to farm for occupation by himself, by lease, grant, words, or otherwise, for term of life or of years, or at will, any lands exceeding eighty acres in the whole, for the purpose of occupying or using or cultivating the same, without the permission in writing of the bishop of the diocese specially given for that purpose under his hand; and every such permission to any spiritual person to take to farm for the purpose aforesaid any greater quantity of land than eighty acres, shall specify the number of years, not exceeding seven, for which such permission is given; and every such spiritual person who shall without such permission so take to farm any greater quantity of land than eighty acres, shall forfeit for every acre of land above eighty acres so taken to farm the sum of forty shillings for each year during or in which he shall so occupy, use or cultivate such land contrary to the provision aforesaid."

Spiritual Persons not to take to farm for Occupation above Eighty Acres, without Consent of the Bishop, and then not beyond Seven Years, under Penalty of 40s. per Acre.

[Sect. 29. "That it shall not be lawful for any spiritual person holding any such cathedral preferment, benefice, curacy, or lectureship, or who shall be licensed or allowed to perform such duties as aforesaid, by himself or by any other for him or to his use, to engage in or carry on any trade or dealing for gain or profit, or to deal in any goods, wares or merchandize, unless in any case in which such trading or dealing shall have been or shall be carried on by or on behalf of any number of partners exceeding the number of six, or in any case in which any trade or dealing, or any share in any trade or dealing, shall have devolved or shall devolve upon any spiritual person, or upon any other person for him or to his use, under or by virtue of any devise, bequest, inheritance, intestacy,

No Spiritual Person beneficed or performing Ecclesiastical Duty, shall engage in Trade, or buy to sell again for Profit or Gain.

(*r*) [See Sir G. Lee's remarks, 2 Lee, 516, *Argar v. Holdsworth*, and the learned judgment of Sir H. Jenner in *Wynn v. Davies and Weever*, 1 Curteis, 69.]

nefices cannot legally be members of a joint stock banking company. *Hall v. Franklin*, 3 Mee. & W. 259; but see 1 Vict. c. 10.]

(*s*) [Spiritual persons holding be-

(*t*) [This act does not extend to Ireland; sect. 133.]

1 & 2 Vict.
c. 106.

Not to extend to Spiritual Persons engaged in keeping Schools, or as Tutors, &c. in respect of any thing done, or any Buying or Selling in such Employment; or to selling any thing *bona fide* bought for the Use of the Family, or to being a Manager, &c. in any Benefit or Life or Fire Assurance Society; or buying and selling Cattle, &c. for the Use of his own Lands, &c.

settlement, marriage, bankruptcy, or insolvency; but in none of the foregoing excepted cases shall it be lawful for such spiritual person to act as a director or managing partner, or to carry on such trade or dealing as aforesaid in person."

[Sect. 30. "That nothing herein-before contained shall subject to any penalty or forfeiture any spiritual person for keeping a school or seminary, or acting as a schoolmaster or tutor or instructor, or being in any manner concerned or engaged in giving instruction or education for profit or reward, or for buying or selling or doing any other thing in relation to the management of any such school, seminary, or employment, or to any spiritual person whatever, for the buying of any goods, wares or merchandizes, or articles of any description, which shall without fraud be bought with intent at the buying thereof to be used by the spiritual person buying the same for his family or in his household, and after the buying of any such goods, wares or merchandizes, or articles, selling the same again or any parts thereof which such person may not want or choose to keep, although the same shall be sold at an advanced price beyond that which may have been given for the same; or for disposing of any books or other works to or by means of any bookseller or publisher; or for being a manager, director, partner, or shareholder in any benefit society, or fire or life assurance society, by whatever name or designation such society may have been constituted; or for any buying or selling again for gain or profit, of any cattle or corn or other articles necessary or convenient to be bought, sold, kept, or maintained by any spiritual person, or any other person for him or to his use, for the occupation, manuring, improving, pasturage, or profit of any glebe, demesne lands, or other lands or hereditaments which may be lawfully held and occupied, possessed or enjoyed by such spiritual person, or any other for him or to his use; or for selling any minerals the produce of mines situated on his own lands; so nevertheless that no such spiritual person shall buy or sell any cattle or corn or other articles as aforesaid in person in any market, fair, or place of public sale."

[VIII. *Punishments and Penalties under 1 & 2 Vict. c. 106 (s).*

Trafficking and Farming.

Spiritual Persons illegally Trading may be suspended, and for the third offence deprived.

[It is enacted by

[Sect. 31. "That if any spiritual person shall trade or deal in any manner contrary to the provisions of this act, it shall be lawful for the bishop of the diocese where such person shall hold any cathedral preferment, benefice, curacy, or lectureship, or shall be licensed or otherwise allowed to perform the duties of any ecclesiastical office whatever, to cause such person to be cited before his chancellor or other competent judge, and it shall be lawful for such chancellor or other judge, on proof in due course of law of such trading, to sus-

(s) [It is expressly provided, that this act shall not affect any powers the bishop may now have "by statute, canon, usage or otherwise howsoever" (see section 132). For the

mode of proceeding to punish non-residence under the old law, before any act of parliament had been passed on the subject, see the case of *Pawlet v. Head*, 2 Lee, 566.—Ed.]

pend such spiritual person for his first offence for such time not exceeding one year as to such judge shall seem fit; and on proof in like manner before such or any other competent ecclesiastical judge of a second offence committed by such spiritual person subsequent to such sentence of suspension, such spiritual person shall for such second offence be suspended for such time as to the judge shall seem fit; and for his third offence be deprived *ab officio et beneficio*, and thereupon it shall be lawful for the patron or patrons of any such cathedral preferment, benefice, lectureship, or office, to make donation or to present or nominate to the same as if the person so deprived were actually dead; and in all such cases of suspension, the bishop during such suspension shall sequester the profits of any cathedral preferment, benefice, lectureship, or office of which such spiritual person may be in possession, and by an order under his hand direct the application of the profits of the same respectively, after deducting the necessary expenses of providing for the due performance of the duties of the same respectively, towards the same purposes and in the same order, as near as the difference of circumstances will admit, as are hereinafter directed with respect to the profits of a benefice sequestered in case of non-compliance after monition with an order requiring a spiritual person to proceed and reside on his benefice, save that no part of such profits shall be paid to the spiritual person so suspended, nor applied in satisfaction of a sequestration at the suit of a creditor; and in case of deprivation the bishop shall forthwith give notice thereof in writing under his hand to the patron or patrons of any cathedral preferment, benefice, lectureship, or office which the said spiritual person may have holden in the manner hereinafter required with respect to notice to the patron of a benefice continuing under sequestration for one whole year, and thereby becoming void, and any such cathedral preferment or benefice shall lapse at such period after the said notice as any such last-mentioned benefice would, under the provisions of this act, lapse: Provided always, That no contract shall be deemed to be void by reason only of the same having been entered into by a spiritual person trading or dealing, either solely or jointly with any other person or persons, contrary to the provisions of this act, but every such contract may be enforced by or against such spiritual person, either solely or jointly with any other person or persons, as the case may be, in the same way as if no spiritual person had been party to such contract."

1 & 2 Vict.
c. 106.

Contract by
Spiritual
Person.

[Besides imposing this restraint on the farming and trafficking of spiritual persons, this statute also empowers the bishop to punish the non-residence of incumbents by the adoption of one of two modes of procedure provided by it for this purpose.

Non-
Residence.
Two Modes
of Proceed-
ing to punish
Non-resi-
dence.

[1. By a summary process of monition and sequestration;
2. By the infliction of certain penalties. In both cases an appeal is given from the order of the bishop to the archbishop.

[First, as to the process by monition and sequestration, it enacts,

[Sect. 54. "That in every case in which it shall appear to the bishop that any spiritual person holding any benefice within his

Residence
may be en-
forced by

1 & 2 Vict.
c. 106.

Monition,
instead of
proceeding
for Penalties.

Time to
elapse be-
tween issue
of Monition
and its Re-
turn.

Bishop may
require Re-
turn to Mo-
nition to be
verified by
Evidence.

May proceed
to sequester.

diocese, and not having a licence to reside elsewhere than in the house of residence belonging thereto, nor having any legal cause of exemption from residence, does not sufficiently, according to the true meaning and intent of this act, reside on such benefice, it shall be lawful for such bishop, instead of proceeding for penalties under this act, or for penalties incurred before the passing of this act under the act of the fifty-seventh year of his majesty King George the Third, or after proceeding for the same, to issue or cause to be issued a monition to such spiritual person, requiring him forthwith to proceed to and to reside on such benefice, and perform the duties thereof, and to make a return to such monition within a certain number of days after the issuing thereof; provided that in every such case there shall be thirty days between the time of serving such monition on such spiritual person, in the manner hereinafter directed, and the time specified in such monition for the return thereto; and the spiritual person on whom any such monition shall be served shall, within the time specified for that purpose, make a return thereto into the registry of the diocese, to be there filed; and it shall be lawful for the bishop to whom any such return shall be made to require such return or any fact contained therein to be verified by evidence (*t*); and in every case where no such return shall be made, or where such return shall not state such reasons for the non-residence of such spiritual person as shall be deemed satisfactory by the bishop, or where such return, or any of the facts contained therein, shall not be so verified as aforesaid, when such verification shall have been required, it shall be lawful for the bishop to issue an order in writing under his hand and seal, requiring such spiritual person to proceed and reside as aforesaid within thirty days after such order shall have been served upon him in like manner as is hereinafter directed with respect to the service of monitions; and in case of non-compliance with such order it shall be lawful for the bishop to sequester (*u*) the profits of such benefice until such order shall be complied with, or such sufficient reasons for non-compliance therewith shall be stated and proved as aforesaid, and to direct, by any order to be made for that purpose under his hand, and filed as aforesaid, the application of such profits, after deducting the necessary expenses of serving the cure, either in the whole or in such proportions as he shall think fit, in the first place to the payment of the penalties proceeded for, if any, and of such reasonable expenses as shall have been incurred in relation to such monition and sequestration, and in the next place towards the repair or sustentation of the chancel, house of residence of such benefice, or any of the buildings and appurtenances thereof, and of the glebe and demesne lands, and in the next place, where such benefice shall be likewise under sequestration at the suit of any creditor, then towards the satisfaction of such last-mentioned sequestration; and after the satisfaction thereof, then and in the next place towards the augmentation or improvement of any such benefice, or the house of residence thereof, or any of the buildings and appurtenances thereof, or towards the improvement of any of

(*t*) [See a further provision on this subject in section 123.] have a priority over all others; see section 110.]

(*u*) [Such sequestrations are to

the glebe or demesne lands thereof, or to order and direct the same or any portion thereof to be paid to the treasurer of the governors of the bounty of Queen Anne, for the purposes of the said bounty, as such bishop shall, in his discretion, under all circumstances, think fit and expedient; and it shall also be lawful for the bishop, within six months after such order for sequestration, or within six months after any money shall have been actually levied by such sequestration, to remit to such spiritual person any proportion of such sequestered profits, or to cause the same or any part thereof, whether the same remain in the hands of the sequestrator or shall have been paid to the said treasurer, to be paid to such spiritual person; and every such sequestrator at the suit of the bishop, is hereby required, upon receiving an order under the hand of such bishop, forthwith to obey the same; and the said treasurer is hereby authorized and required, upon receiving a like order from such bishop, to make such payment out of any money in his hands: Provided always, that any such spiritual person may, within one month after service upon him of the order for any such sequestration, appeal to the archbishop of the province, who shall make such order relating thereto, or to the profits that shall have been so sequestered as aforesaid, for the return of the same or any part thereof to such spiritual person, or to such sequestrator at the suit of any creditor, (as the case may be,) or otherwise as may appear to such archbishop to be just and proper; but nevertheless such sequestration shall be in force during such appeal."

1 & 2 Vict.
c. 106.

Appeal
against Se-
questration
to the Arch-
bishop.

[Sect. 55. "That every spiritual person to whom any such monition or order in writing shall be issued as aforesaid, who shall be at the time of the issuing thereof absent from his benefice, contrary to the provisions of this act, but who shall forthwith obey such monition or order, and the profits of whose benefice shall by reason of such obedience not be sequestered, shall nevertheless pay all costs, charges, and expenses incurred by reason of the issuing and serving such monition or order, and that the proceedings thereon shall not be stayed until such payment shall be made."

Incumbents
returning to
Residence on
Monition to
pay the Costs.

[Sect. 56. "And for effectually enforcing *bond fide* residence according to the intent of such monition and order, be it enacted, that if any spiritual person, not having a licence to reside out of the limits of his benefice, nor having other lawful cause of absence from the same, who after any such monition or order as aforesaid requiring him to reside, and before or after any such sequestration as aforesaid, shall in obedience to any such monition or order have begun to reside upon his benefice, shall afterwards, and before the expiration of twelve months next after the commencement of such residence, wilfully absent himself from such benefice for the space of one month together, or to be accounted at several times, it shall be lawful for the bishop, without issuing any other monition or making any order, to sequester and apply the profits of such benefice, as before directed by this act, for the purpose of enforcing the residence of such spiritual person, according to the true intent of the original monition issued by the bishop as aforesaid; and it shall be lawful for the bishop so to proceed in like cases from time to time as often as occasion may require; provided that in each such case such spiritual person may, within one month after the

Incumbent
returning to
Residence on
Monition, but
again absent-
ing himself
within twelve
Months, the
Bishop may,
without fur-
ther Moni-
tion, se-
quester.

1 & 2 Vict.
c. 106.

Reasons for
remitting
Penalties for
Non-resi-
dence of a
certain
Amount to
be trans-
mitted to the
Queen in
Council.

Benefice con-
tinuing so se-
questered
one Year, or
being twice
so seques-
tered within
two Years, to
become void.

service upon him of the order for any such sequestration, appeal to the archbishop of the province, who shall make such order relating thereto, or to the profits sequestered, or to any part thereof, as to him may seem just and proper, but nevertheless such sequestration shall be in force during such appeal."

[Sect. 57. "That in every case in which any archbishop or bishop shall think proper, after proceeding by monition for the recovery of any penalty under this act for non-residence of more than one third part of the yearly value of any benefice for any non-residence exceeding six months in the year, to remit the whole or any part of any such penalty, such archbishop shall forthwith transmit to her majesty in council, and such bishop shall forthwith transmit to the archbishop of the province to which he belongs, a statement of the nature and special circumstances of each case, and the reasons for the remission of any such penalty; and it shall thereupon be lawful for her majesty in council, or for the archbishop, as the case may be, to allow or disallow such remission in whole or in part, in the same manner as is provided in this act with relation to the allowance or disallowance of licences of non-residence granted in cases not hereinbefore expressly enumerated: Provided always, that the decision of the archbishop with respect to cases transmitted to him from a bishop shall be final."

[Sect. 58. "That if the benefice of any spiritual person shall continue for the space of one whole year under sequestration issued under the provisions of this act for disobedience to the bishop's monition or order requiring such spiritual person to reside on his benefice, or if such spiritual person shall, under the provisions of this act, incur two such sequestrations in the space of two years, and shall not be relieved with respect to either of such sequestrations upon appeal, such benefice shall thereupon become void; and it shall be lawful for the patron of such benefice to make donation or to present or nominate to the same as if such spiritual person were dead; and the bishop, on such benefice so becoming void, shall give notice in writing under his hand to such patron, which notice shall either be delivered to such patron or left at his usual place of abode, or if such patron or place of abode shall be unknown, or shall be out of England, such notice shall be twice inserted in the London Gazette, and also twice in some newspaper printed and usually circulated in London, and in some other newspaper usually circulated in the neighbourhood of the place where such benefice is situate; and for the purposes of lapse the avoidance of the benefice shall be reckoned from the day on which such notice shall have been delivered as aforesaid, or from the day on which six months shall have expired after the second publication of such notice in the London Gazette, as the case may be; and every such notice in the Gazette and newspapers shall state that the patron or the place of abode of the patron is unknown, or that he is said to be out of England, as the case may be, and that the benefice will lapse, at the furthest, after the expiration of one year from the second publication thereof as aforesaid; and upon any such avoidance it shall not be lawful for the patron to appoint by donation or present or nominate to such benefice so avoided the person by reason of whose non-residence the same was so avoided."

[Secondly, as to the infliction of certain penalties. The

amount of these penalties, and the causes by which they are incurred, will be found under the title **Residence**, in this volume. In this chapter we have to consider only the mode of their enforcement, for which particular regulations are specified in the act itself (s. 114). So also it prescribes a particular course for the recovery of all expenses attendant on the execution of its provisions (s. 115), and for the issue of monitions and sequestrations in cases of non-residence (ss. 112, 113), and for the institution of an appeal from the order of the bishop (s. 111). The enactments of the statute on these subjects are as follows :

[Sect. 107. "That all the powers, authorities, provisions, regulations, matters and things in this act contained, in relation to bishops in their dioceses, shall extend and be construed to extend to the archbishops in the respective dioceses of which they are bishops, and also in their own peculiar jurisdictions, as fully and effectually as if the archbishops were named with the bishops in every such case."

Provisions relating to Bishops to apply to Archbishops in their own Dioceses.

[Sect. 108 extends the power to all exempt (x) places.

[Sect. 109. "That in every case in which jurisdiction is given to the bishop of the diocese or to any archbishop, under the provisions of this act, and for the purposes thereof, and the enforcing the due execution of the provisions thereof, all other and concurrent jurisdiction in respect thereof shall, except as herein otherwise provided, wholly cease, and no other jurisdiction in relation to the provisions of this act shall be used, exercised, or enforced, save and except such jurisdiction of the bishop and archbishop under this act, any thing in any act or acts of parliament, or law or laws, or usage or custom to the contrary notwithstanding."

Where Jurisdiction is given to Bishop, &c. all concurrent Jurisdiction to cease.

[Sect. 110. "That every sequestration issued under the provisions of this act shall have priority, and the sums to be thereby recovered shall be paid and satisfied in preference to all other sequestrations, and the sums to be thereby recovered, except such sequestrations as shall be founded on judgments duly docketed before the passing of this act, and also except such sequestrations as shall have been issued before any sequestration under this act under the provisions of an act passed in the seventeenth year of the reign of King George the Third, for promoting the residence of the parochial clergy, and the monies to be recovered by such excepted sequestrations respectively."

Sequestrations under this Act to have Priority.

[Sect. 111. "That all appeals under the provisions of this act to any archbishop shall be in writing signed by the party appealing, and that in order to discourage frivolous appeals, no proceeding shall be had in any such appeal until the appellant shall, if required, have given security, in such form and to such amount as the archbishop shall direct, of payment to the bishop of such costs as shall be awarded by the archbishop if he shall decide against the appellant ; and that, after such security, if required, shall have been given, the said archbishop shall forthwith, either by himself or by some commissioner or commissioners appointed under his hand from among the other

Appeals under this Act.

(x) [See title **Peculiars**.]

1 & 2 Vict.
c. 106.

bishops of his province, make or cause to be made inquiry into the matter complained of, and shall after such inquiry, and in the latter case after a report in writing from his said commissioner or commissioners, give his decision in such appeal in writing under his hand; and when he shall decide the merits of the appeal against the appellant, he shall also award and direct whether any and what amount of costs shall be paid by the appellant to the bishop respondent; and in like manner, when he shall decide in favour of the appellant, he shall also award and direct whether any and what amount of costs shall be paid by the bishop respondent to the appellant."

Regulations
respecting
Monitions.

Personal Ser-
vice;

and Seques-
trations.

Sequestration
not to issue
after Moni-
tion to reside,
until Service
of Order.

Penalties
against Spi-
ritual Per-
sons under
this Act,
when and
how to be
recovered.

[Sect. 112. "That in all cases in which proceedings under this act are directed to be by monition and sequestration, such monition shall issue under the hand and seal of the bishop, and such monition, and any other instrument or notice issued in pursuance of the provisions of this act, and not otherwise specially provided for, shall be served personally upon the spiritual person therein named or to whom it shall be directed, by showing the original to him and leaving with him a true copy thereof, or, in case such spiritual person cannot be found, by leaving a true copy thereof at his usual or last known place of residence, and by affixing another copy thereof upon the church door of the parish in which such place of residence shall be situate, and also, in the case of such monition, by leaving another copy thereof with the officiating minister or one of the churchwardens of the said parish, and also by affixing another copy thereof on the church door of the parish in which the benefice of such spiritual person shall be situate; and such monition or other instrument, or notice as aforesaid, shall, immediately after the service thereof, be returned into the consistorial court of such bishop, and be there filed, together with an affidavit of the time and manner in which the same shall have been served; and thereupon, in case of such monition, it shall be competent to the party monished to show cause, by affidavit or otherwise, as the case may require, why a sequestration should not issue according to the tenor of such monition; and if such spiritual person shall not, within the time assigned by such monition, show sufficient cause to the contrary, such sequestration shall issue under the seal of the consistorial court of such bishop, and shall be served and returned into the registry of such court in like manner as is hereinbefore directed with respect to monitions issued under the provisions of this act."

[Sect. 113. "That in any case of non-residence in which a monition shall have been served upon any spiritual person under the provisions of this act, requiring such spiritual person to reside on his benefice, no sequestration shall issue until an order requiring such spiritual person to proceed and reside upon such benefice within thirty days, as hereinbefore enacted, shall have been served upon him in the same manner as is hereinbefore directed as to the service of monitions."

[Sect. 114. That all penalties and forfeitures which shall be incurred under this act by any spiritual person holding a benefice shall and may be sued for and recovered in the court of the bishop of the diocese in which such benefice is situate, and by some person duly authorized for that purpose by such bishop by writing under his hand and seal, and in no other court, and by or at the instance

of no other person whatever ; and that the payment of every such penalty or forfeiture, together with the reasonable expense incurred in recovering the same, shall and may be enforced by monition and sequestration ; and that it shall and may be lawful for such bishop, by any order made for that purpose in writing under his hand, and to be registered in the registry of the diocese, which the registrar is hereby required to do, to direct that every such penalty or forfeiture so recovered as aforesaid, and which shall not have been remitted in whole or in part, or so much thereof as shall not have been remitted, shall be applied towards the augmentation or improvement of such benefice or of the house of residence thereof, or of any of the buildings or appurtenances thereof."

1 & 2 Vict.
c. 106.

Application
of Penalties
recovered.

[Sect. 115. "That all fees, charges, costs, and expenses incurred or directed to be paid by any spiritual person holding any benefice under the provisions of this act, which shall remain unpaid for the period of twenty-one days after demand thereof in writing delivered to or left at the usual or last place of abode of such spiritual person, may be recovered by monition and sequestration : Provided always, that it shall be lawful for the person or persons of whom any such fees, costs, charges, and expenses shall be so demanded to apply to the bishop of the diocese to order the taxation thereof, and such bishop shall thereupon order some proper person to tax and settle the same ; and the certificate of allowance, by the person so to be appointed, of such fees, costs, charges, and expenses so to be taxed, shall be final."

Recovery of
Fees, &c. by
Monition and
Sequestra-
tion (z).

Their Taxa-
tion.

[Sect. 116. That if the registrar of any diocese shall refuse or neglect to make any entry, or to do any other matter or thing prescribed by this act, he shall forfeit for every such refusal or neglect the sum of five pounds."

Penalty on
Registrar for
Neglect.

[Sect. 117. "That all penalties and forfeitures under this act incurred by persons not spiritual, or by spiritual persons not holding benefices, shall be sued for and recovered by any person who will sue for the same by action of debt in any of her majesty's courts of record at Westminster."

Recovery of
Penalties
against Lay-
men or un-
beneficed
Clergymen.

[Sect. 118. "That no penalty shall be recovered against any spiritual person, under the provisions of this act, other or further than those which such spiritual person may have incurred subsequent to the first day of January in the year immediately preceding the year in which such proceedings shall be commenced."

Penalties not
recoverable
for more than
one Year.

[Sect. 119. That all penalties recovered under the provisions of this act, the application of which is not specially directed thereby, shall be paid over to the treasurer of the governors of the bounty of Queen Anne, to be applied to the purposes of the said bounty."

Application
of Penalties.

[Sect. 120. "That for all the purposes of this act, except as herein otherwise provided, the year shall be deemed to commence on the first day of January, and be reckoned therefrom to the thirty-first day of December, both inclusive."

Commence-
ment and
Conclusion of
the Year.

[Sect. 121. "That for all the purposes of this act the months therein named shall be taken to be calendar months, except in any case in which any month or months are to be made up of different periods less than a month, and in every such case thirty days shall be deemed a month."

How Months
to be calcu-
lated.

(z) [See a further provision on this subject, section 119.]

1 & 2 Vict.
c. 106.

Certified
Copy of En-
try of Li-
cence to be
Evidence.

Statements
how to be
verified.

Before whom
Affidavits
may be made.

[Sect. 122. "That in every case where by the provisions of this act the copy of any licence is required to be filed or entered in the registry of the diocese, a copy thereof, certified by the registrar, shall be admissible as evidence in all courts and places whatever."

[Sect. 123. "That when authority is given by this act to any archbishop or bishop to require any statement or facts to be verified by evidence, or to inquire or to cause inquiry to be made into any facts, such archbishop or bishop may require any such statement or any of such facts to be verified in such manner as the said archbishop or bishop shall see fit; and that when any oath, affidavit, or affirmation or solemn declaration is or may be by or in pursuance of the provisions of this act required to be made, such oath, affidavit, or affirmation or solemn declaration shall and may be made either before such archbishop or bishop, or the commissioner or commissioners, or one of them, of such archbishop or bishop respectively, or before some ecclesiastical judge or his surrogate, or before a justice of the peace, or before a master or master extraordinary in chancery, who are hereby authorized and empowered in all and every of the cases aforesaid to administer such oath, affidavit, and affirmation, or to take such declaration, as the case may be."—ED.]

IX. *Profession cannot be relinquished, or two Benefices served in one Day.*

Shall not re-
linquish his
Profession.

By Canon 76, "no man being admitted a deacon or minister, shall from thenceforth voluntarily relinquish the same, nor afterwards use himself in the course of his life as a layman, upon pain of excommunication. And the churchwardens shall present him."

No Spiritual
Person to
serve more
than Two
Benefices in
One Day.

[By s. 106 of 1 & 2 Vict. c. 106, it is enacted, "That no spiritual person shall serve more than two benefices in one day unless in case of unforeseen and pressing emergency, in which case the spiritual person who shall so have served more than two benefices shall forthwith report the circumstance to the bishop of the diocese."—ED.]

Conclusion.

After all, these distinctions of the clergy are shadows rather than substance, being most of them about matters which are obsolete and of no significance. The *restraints*, as to the scope and purport of them, are such as the clergy for the most part would choose to put upon themselves: and the *privileges*, such as they are, seem to be scarcely worth claiming; and some of them one would almost imagine to have been calculated to bring a disgrace upon the clergy, rather than to be of any real benefit to them; for why should a clergyman be protected from paying his just debts more than any other person, or be saved from punishment for a crime for which another person ought to be hanged? And it is hoped, there hath not been one instance of a clergyman having needed to claim the privilege of his order a second time, for a crime for which a layman by the laws of his country should suffer death.

Probate of Wills—See Wills.**Proctor (a).**

1. Appointment of, and Proxies 375	4. Mandamus does not lie for the
2. Statutes respecting 378	Office 381
3. Power of Ecclesiastical Court	5. Forms of Proxies 382
over 380	

I. Appointment of, and Proxies (b).

[“ **PROCTORS** in the Ecclesiastical and Admiralty Courts discharge duties similar to those of solicitors and attornies in other courts.

[“ In order to entitle a person to be admitted a proctor, to practise in the Court of Arches, it is required that he shall have served a clerkship of seven years, under articles, with one of the thirty-four senior proctors, who must be of five years’ standing; and who, by the rules of the court, is prohibited from taking a second clerk until the first shall have served five years; except in the event of the death of a proctor, to whom a clerk may have been articted, before the term of his clerkship is completed. In this case any other of the thirty-four senior proctors may take such clerk for the remainder of the term, although he himself may at the same time have a clerk of less than five years’ standing. Before a clerk is permitted to be articted, he is required to produce a certificate of his having made reasonable progress in classical education.

Who may be
Proctors.

[“ When the term of seven years is completed, the party is admitted a notary, by a faculty from the Archbishop of Canterbury; a petition is then presented to his grace, accompanied by a certificate, signed by three advocates and three proctors, that the party applying to be admitted has served, as articted clerk to a proctor of the court, for the full term of seven years. If this certificate is approved, the archbishop issues his fiat, and a commission is directed to the dean of the arches, by whom the party is admitted under the title of a supernumerary, with similar ceremonies to those observed on the admission of an advocate.

[“ The proctor so admitted is qualified to commence business upon his own account immediately, but he is not entitled to take an articted clerk, until he shall have been for five

(a) [See titles **Notary Public** and **Practice**, in this volume.] into Practice and Jurisdiction of Ecclesiastical Courts, 1832.]

(b) [See Report of Commissioners

years within the number of the thirty-four senior proctors." —ED.]

Proctors how appointed.

Proxies.

The Nature of a Proxy how far requisite, and when it may be dispensed with.

When the Proxy of the Wife is not necessary to enable the Husband to appear in a Suit for Money left to her.

Proctors are officers established to represent in judgment the parties who empower them (by warrant under their hands called a *proxy*) to appear for them, to explain their rights, to manage and instruct their cause, and to demand judgment (*p*). [Two *proxies* are generally executed; one authorising the proctor to institute, the other to withdraw proceedings. They are signed by the parties, attested by two witnesses, and deposited in the registry of the court. The proctor, till such power be withdrawn, is *dominus litis* (*q*). See title *Practice*.

[The exhibition of letters of administration have been holden to be tantamount to a proxy (*r*). Where, on the death of an archdeacon, the proceedings in a criminal suit were moved after the execution of a proxy, but before appearance by the defendant either personally or by proxy, from the archidiaconal to the episcopal court, and they went on to sentence without a new proxy, it was held, on appeal, that the appellant, having been cognizant *de facto* of the progress of the suit, and, through his proctor in the court of appeal, having recognized (by some of the formal documents in the cause) that the proctor in the court below was his lawful proctor, that the proceedings were valid. And it would seem that if no proxy at all were given, the proceedings would not be null, unless it were proved that no authority was given *de facto* to the proctor, and the principal was ignorant of them, the proxy being only essential to secure the adverse party, and to protect the proctor (*s*). Where a proxy had been granted by a husband in India to institute proceedings in the court of Exeter against his wife for adultery, and the wife had changed her residence before the commencement of the suit into another diocese, the court proceeded under letters of request from that latter diocese without a new proxy from the husband (*t*). Where a party refuses to admit a proxy, or to appear, the court will proceed as if the party had appeared and raised no opposition (*u*). If a wife is separated from her husband, and money is left to her, and the will is contested, the wife cannot, by her refusal to join with the husband in the execution of a proxy, cause a failure of justice, and deprive the husband of the interest vested in him. She must be applied to for her proxy, and, on affidavit made of her refusal, proxy will be accepted from the husband alone. Nor will the court allow a wife to give in a proxy renouncing administration, which has been decreed to her, in opposition to the wish

(*p*) 2 Dom. 583.

(*q*) [See post, "Forms of Proxies."]

(*r*) [Kirkhouse v. Fawcener, 2 Lee, 331.]

(*s*) [Prankard v. Deacle, 1 Hagg. 169; 4 Hagg. 402.]

(*t*) [Hawkes v. Hawkes, 1 Hagg. 194.]

(*u*) [Cook v. Cowper, 2 Lee, 487. For the form of a proxy in a criminal suit, see note to Watson v. Thorp, 1 Phill. 273.]

of her husband (*x*). But a married woman, a party in a cause, will be permitted to appoint a proctor in *the absence of her husband*, on giving reasonable security to the other party as to his costs (*y*). See form, *post*.

[A proctor is not obliged to answer to foreign seals, and to the subscription and seals of foreign notaries; the rule of a proctor's answering extends only to the seals of courts in England, and to the seals and subscriptions of English notaries, with which the law supposes him to be acquainted (*z*).—*ED.*]

Proctor not
obliged to
answer Fo-
reign Seals.

And by the 5 Geo. 2, c. 18, s. 2, no proctor in any court shall be a justice of the peace during such time as he shall continue in the business and practice of a proctor.

[By 55 Geo. 3, c. 184, Sched. Part First, "Every admission of any person to the office of proctor in any of the courts, shall be upon a 25*l.* stamp. And every practising solicitor, attorney, notary, proctor, agent, or procurator, must take out a certificate annually; upon which there shall be charged, if he reside in the city of London or Westminster, or within the limits of the twopenny post in England, or within the city or shire of Edinburgh, and shall have been admitted to his office three years, 12*l.*; if not so long, 6*l.* If he shall reside elsewhere, and have been admitted three years, 8*l.*; if not so long, 4*l.*: but no one person is obliged to take out more than one such certificate, though he may act in more than one of the above capacities, or in several of the courts aforesaid."—*ED.*]

Stamp of
Schedule.

Can. 129. "None shall procure in any cause whatsoever, unless he be thereunto constituted and appointed by the party himself, either before the judge, or by act in court; or unless in the beginning of the suit, he be by a true and sufficient proxy thereunto warranted and enabled. We call that proxy sufficient, which is strengthened and confirmed by some authentic seal, and party's approbation, or at least his ratification therewithal concurring. All which proxies shall be forthwith by the said proctors exhibited into the court, and be safely kept and preserved by the register in the public registry of the said court. And if any register or proctor shall offend herein, he shall be secluded from the exercise of his office for the space of two months, without hope of release or restoring.

Canons
respecting
Proctors.

"Whereas a custom is said to prevail, that he who is cited to a certain day constitutes a proctor for that day without letters, or by letters not sealed with an authentic seal; by which means it happeneth, that whilst such proctor will not prove his mandate, or confirm his letters by witnesses, or some other impediment comes in the way, nothing is done that day, nor on the following day, the proctor's office being at an end; and

(*x*) [*Cook v. Cowper*, 2 Lee, 389, and case in the note referred to in judgment.]

(*y*) [*Suter v. Christie and others*, 2 Add. 150.]

(*z*) [Sir G. Lee; *Raymond v. Baron Von Watteville*, 2 Lee, 555.]

so all former diligence is lost without any effect. As a caution against this fallacy, we do ordain, that for the future a special proctor be constituted absolutely without any limitation of time; or if he be constituted for the day, yet not for one day only, but for several days, to be continued if need be. And the mandate shall be proved by an authentic writing; unless he be constituted in the acts of court, or the constitutor cannot easily find an authentic seal (z).

“We do ordain, that no dean, archdeacon or his official, or bishop’s official, shall set his seal to any proxy, unless it be publicly requested of him in court, or out of court, when he who constituteth the proctor, and is known to be the principal party, is present, and personally requesteth it. And whatsoever dean, archdeacon or his official, or official of the bishop, shall do the contrary out of certain malice, shall be *ipso facto* suspended from his office and benefice for three years. And if any advocate shall procure a false proxy to be made, he shall be suspended for three years from his office of advocate, and be disabled to hold any ecclesiastical benefice, and if he be married or bigamus [*whereby in those days he was incapacitated to hold a benefice*] he shall be excommunicated *ipso facto*; and whatever shall be done by virtue of such false proxy shall be utterly void to all intents and purposes, and the proctor who was the chief actor in such falsity shall be for ever repelled from executing any legal act. And all of these nevertheless, if they shall be convicted, shall be bound to render damages to the party injured (a).”

7. Canon 130. “For lessening and abridging the multitude of suits and contentions, as also for preventing the complaints of suitors in courts ecclesiastical, who many times are overthrown by the oversight and negligence, or by the ignorance and insufficiency of proctors, and likewise for the furtherance and increase of learning and the advancement of civil and canon law, following the laudable customs heretofore observed in the courts pertaining to the archbishop, we will and ordain that no proctor exercising in any of them shall entertain any cause whatsoever, and keep and retain the same for two court days, without the counsel and advice of an advocate, under pain of a year’s suspension from his practice; neither shall the judge have power to release or mitigate the said penalty without express mandate and authority from the archbishop.”

II. Statutes respecting.

[The 53 Geo. 3, c. 127 (b) (passed 12th July, 1813), contained the following provisions with respect to proctors:

(z) Otho, Athon, 61.

(a) Peccham, Lind. 76.

(b) [See title *Excommunication*,

vol. ii.; and Orders of Court as to the conduct of a cause by proctors, under title *Practice*, ante, p. 229, 230.]

[Sect. 8. "That from and after the passing of this act, if any proctor of the Arches Court of Canterbury, or any other ecclesiastical court or courts in which he shall be entitled to act as proctor, shall act as such, or permit or suffer his name to be in any manner used in any suit, the prosecution or defence whereof shall appertain to the office of a proctor, or in obtaining probates of wills, letters of administration or marriage licences, to or for, or on account or for the profit and benefit of any person or persons not entitled to act as a proctor, or shall permit or suffer any such person or persons to demand or participate in such profit and benefit, and complaint thereof shall be made to the court or courts wherein such proctor hath been admitted and enrolled, and proof given to the satisfaction of the said court or courts that such proctor hath offended therein as aforesaid, then and in such case every such proctor so offending shall be struck off the roll of proctors, and be for ever after disabled from practising as a proctor, or be suspended from the office, function and practice of a proctor in all and every the said court or courts for so long a period as the judge or judges of the said court or courts may deem fit; save and except as to any allowance or allowances, sum or sums of money that are or shall be agreed to be made to the widows or children of any deceased proctor or proctors by any surviving partner or partners of such deceased proctor or proctors; and also save and except as to any agreement made, or understood to have been made, between proctors and articted clerks, whose articles have been executed prior to the passing of this act."

Proctors allowing their Names to be used by Persons not entitled to act as Proctors, struck off Roll.

Exceptions.

[Sect. 9. "That from and after the passing of this act, in case any person or persons shall in his or in their own name, or in the name of any other person or persons, make, do, act, exercise or perform any act, matter or thing whatsoever in any way appertaining or belonging to the office, function or practice of a proctor, for or in consideration of any gain, fee or reward, or with a view to participate in the benefit to be derived from the office, functions or practice of a proctor, without being admitted and enrolled, every such person, for every such offence, shall forfeit and pay the sum of fifty pounds, to be sued for and recovered in manner hereinafter mentioned."

Persons exercising Functions of a Proctor not being duly enrolled.

Penalty.

[Sect. 10. "Provided always, and be it further enacted, that nothing herein contained shall extend or be construed to extend to any salary which shall be agreed to be paid by a proctor, his partner or successor, to a clerk really and *bond fide* serving in his office at the time of the passing of this act, and who shall have been *bond fide* serving in the office of any proctor or proctors for seven years next before the passing of the same."

Proviso for Salaries of Clerks of Seven Years standing.

[Sect. 11. "That all pecuniary forfeitures and penalties imposed on any person or persons for offences committed against this act, shall and may be sued for and recovered in any of his majesty's courts of record at Westminster, by action of debt, bill, plaint, or information, wherein no essoin, protection, privilege, wager of law, or more than one imparlance shall be allowed, and wherein the plaintiff, if he or she shall recover any penalty or penalties, shall receive the same for his or her own use, with full costs of suit."]

Recovery of Penalties, &c.



III. *Power of the Ecclesiastical Court over Proctors.*

Power of the
Ecclesiastical
Court over
Proctors.

[By section 16 of 10 Geo. 4, c. 7, Roman Catholics are excluded from any office in the Ecclesiastical Courts (*d*). By section 14 of 41 Geo. 3, c. 79, it is provided that nothing in that act regulating public notaries shall apply to a proctor in the Ecclesiastical Courts (*e*).—ED.]

H., 2 Will. 3, *Leigh's case* (*f*). A proctor of Doctors' Commons, who had done business without the advice of an advocate, contrary to the canon, and refused to pay a tax of 10s. imposed upon him by order of the court towards the charges of the house, and was suspended from his office, prayed a mandamus in the Court of King's Bench to be restored: but it was denied, and said by the court, that officers are incident to all courts, and must partake of the nature of those several and respective courts in which they attend; and the judges, or those who have the supreme authority in such courts, are the proper persons to censure the behaviour of their own officers; and if they should be mistaken, the King's Bench cannot relieve; for in all cases where such judges keep within their bounds, no other court can correct their errors in proceedings; and if any wrong be done in this case, the party must appeal.

[Where a party regularly complains of gross extortion by his proctor, the court may punish the proctor by suspension or otherwise (*g*). In a case where a proctor had charged 88*l.* 4*s.* 4*d.*, and the bill was referred to the registrar, who reported the proper charge to be 52*l.* 15*s.* 6*d.*, the court suspended the proctor for three months, and condemned him in costs: in this case it was the first time his conduct had been brought before the court, and there were other extenuating circumstances (*h*). A client is under all circumstances entitled to a detailed bill of costs from his proctor; and where it has been long acquiesced in, and payment made after the close of the suit, he is not entitled to have it referred to the registrar for examination (*i*). A proctor is *dominus litis*, and therefore responsible to the court for the purity of his proceedings (*k*). But the court has no power to decide what expenses are due between proctor and client, or to enforce payment of them; but where costs are given against a party, the court, in order to carry its sentence into execution, is empowered to tax the costs and to enforce their payment. All that the court can do in the case of proctor and client is to

(*d*) [See title *Popery*.]

(*e*) [See the act under title *Public Notary*.]

(*f*) *Gibs.* 995; 3 *Mod.* 332.

(*g*) [*Prentice v. Prentice*, 3 *Phill.* 311; *Peddle v. Evans*, 3 *Hagg.* 689.]

(*h*) [*In the Goods of Lady Hatton Finch*, 3 *Hagg.* 255.]

(*i*) [*Peddle v. Toller*, 3 *Hagg.* 296.]

(*k*) [*Myun v. Robinson*, 2 *Hagg.* 195.]

refer the bill to the registrar for his examination; this is merely in aid of justice, and for the convenience of suitors (l). —ED.]

8. Canon 131. "No judge in any of the said courts shall admit any libel or any other matter without the advice of an advocate admitted to practise in the same court, or without his subscription; nor shall any proctor conclude any cause depending, without the knowledge of the advocate retained and feed in the cause; which if the proctor shall do or procure to be done, or shall by any colour whatsoever defraud the advocate of his duty or fee, or shall be negligent in repairing to the advocate and requiring his advice what course is to be taken in the cause, he shall be suspended from all practice for the space of six months, without hope of being thereunto restored before the said term be fully complete."

9. Canon 133. "Forasmuch as it is found by experience that the loud and confused cries and clamours of proctors in the courts of the archbishop are not only troublesome and offensive to the judges and advocates, but also give occasion to the standers-by of contempt and calumny towards the court itself; to the end that more respect may be had to the dignity of the judge, and that causes may more easily and commodiously be handled and dispatched, we charge and enjoin, that all proctors in the said courts do especially intend that the acts be faithfully entered and set down by the registrar according to the advice and direction of the advocate; that the said proctors refrain loud speech and babbling, and behave themselves quietly and modestly, and that when either the judges or advocates, or any of them, shall happen to speak, they presently be silent, upon pain of silencing for two whole terms then immediately following every such offence of theirs; and if any of them shall the second time offend therein, and after due monition shall not reform himself, let him be for ever removed from his practice."

IV. *Mandamus does not lie for the Office.*

10. It hath been adjudged that no mandamus lies to restore a proctor of Doctors' Commons, admitting that no appeal lay from the dean of the Arches to the archbishop as visitor; because this is an ecclesiastical office, and a matter properly and only cognizable in that court; and that the temporal courts are not to intermeddle or inquire into this sentence, or into the proceedings in any matters whereof they have a proper jurisdiction, but are to give credit thereunto; although it was urged, that if a mandamus did not lie in this case, the party would be without remedy, for that no assise would lie of

(l) [*Peddle v. Toller*, 3 Hagg. 389 (Sir J. Nicholl.)]

this office ; and though an action on the case might lie, yet it may be defective, because a jury may not well compute the damages in proportion to the loss of a man's livelihood ; besides it was urged that a mandamus ought to lie in this case as well as for an attorney of an inferior court, because this is an officer of a more public concern (m).

—◆—

[V. *Forms of Proxies.*

[*Form of Proxy appointing a Proctor to propound the Will of a Party deceased on behalf of an Executor.*

[Whereas there is now depending in the Prerogative Court of Canterbury a certain cause or business of proving in solemn form of law the last will and testament of A. B., late of —, in the county of —, deceased, promoted and brought by C. D., the sole executor named in the said will, on the one part, against E. F., the brother, and one of the next of kin of the said deceased, on the other part.

[Now know all men by these presents, that I, the said C. D., for divers good causes and considerations me thereunto specially moving, have nominated, constituted and appointed, and do hereby nominate and appoint Y. Z. notary public, and one of the procurators exerceat of the Arches Court of Canterbury, or in his absence any other proctor of the said court, to be my true and lawful proctor, for me and in my name to appear before the Right Honourable Sir H. J., Knight, Doctor of Laws, Master, Keeper or Commissary of the Prerogative Court of Canterbury, lawfully constituted, his surrogate, or any other competent judge, in this behalf; and to exhibit this my proxy, and pray and procure the same to be admitted, and for me and in my name, in virtue thereof, to confess the interest of the said E. F. (to wit), that he is the natural and lawful brother and one of the next of kin of the said A. B., the party in the said cause deceased; and in case the validity of the said last will and testament of the said deceased should be opposed, to propound the same in solemn form of law, and to give an allegation or allegations in writing on my part and behalf, and procure such allegation or allegations to be admitted, and the answers of the said E. F. to be given thereto on oath, produce witnesses, and procure them to be received, sworn, and examined thereon, and publication of their sayings and depositions decreed; to receive an allegation or allegations, if any be given, on the part and behalf of the said E. F.; see witnesses produced, sworn, and examined thereon, and publication of their sayings and depositions decreed; and also, if necessary, to give a further allegation or allegations in writing on my behalf, produce witnesses, and procure them to be received, sworn and examined thereon, and publication of their sayings and depositions decreed; and pray and procure the cause to be assigned for sentence on the first and second assignations, and generally throughout the cause on my behalf to do whatever may be needful for procuring a definitive sentence or final decree in the said cause, pronouncing for the force and validity of the said will; giving and hereby granting unto my said proctor full power and authority to appoint one or more substitute or substitutes for any or either of the above purposes. And what my said

proctor, his substitute, or either of them, shall lawfully do or cause to be done in or about the premises on my part and behalf, I do hereby promise to ratify, allow and confirm. In witness whereof I have hereunto set my hand and seal, this — day of —, A. D. —.

[Signed, sealed, and delivered }
in the presence of us,

J. T.
T. T.

C. D. (L. S.)

[Form of Proxy appointing a Proctor to contest the validity of a Will.

[Whereas A. B., late of —, in the county of —, departed this life some time since, having first made and executed a pretended last will and testament, bearing date the — day of —, and did therein name C. D. executor: and whereas the undersigned E. F. is the natural and lawful brother and one of the next of kin of the said deceased:

[Now know all men by these presents, that I, the above-named E. F., for divers good causes and considerations me thereunto especially moving, do hereby nominate, constitute, and appoint L. M., notary public, of Doctors' Commons, London, one of the procurators exercent in the Arches Court of Canterbury, or in his absence any other proctor of the said court, to be my true and lawful proctor for me, and in my name and on my behalf to appear before the Right Honourable Sir H. J., Knight, Doctor of Laws, Master, Keeper or Commissary of the Prerogative Court of Canterbury, lawfully constituted, his surrogate, or some other competent judge, in this behalf, to exhibit this my proxy, and pray and procure the same to be admitted; and in virtue thereof to pray an answer to my interest as being the natural and lawful brother, and one of the next of kin of the said deceased; and to declare I oppose the pretended will of the said deceased, bearing date as aforesaid as pretended, to receive an allegation or allegations propounding the same, see witnesses produced thereon, administer interrogatories to them, and publications of their sayings and depositions had and decreed; and if need be or occasion require to give an allegation or allegations on my behalf, see witnesses produced, sworn and examined thereon, publication of their sayings and depositions had and decreed, and generally and otherwise to do and perform all such other acts, matters, and things as may be needful and necessary in and about the premises, as my said proctor or proctors, his or their substitute or substitutes, may consider necessary towards procuring a definitive sentence or final decree to be made and interposed herein; and I hereby give full power and authority for my said proctor to appoint one or more substitute or substitutes at pleasure, to revoke the same and appoint anew; hereby promising to ratify, allow, and confirm all and whatsoever my said proctor, his substitute or substitutes, shall do herein. In witness whereof I have hereunto set my hand and seal, this — day of —, A. D. —.

[Signed, sealed, and delivered }
by the said E. F., in the
presence of us,

J. T.
H. T.]

E. F. (L. S.)

For the fees of proctors, see title Fees.

Procuration—See **Visitation**.

Profaneness.

Profaneness
indictable by
the Common
Law.

ALL blasphemies against God, as denying his being or providence; and all contumelious reproaches of Jesus Christ; all profane scoffing at the Holy Scriptures, or exposing any part thereof to contempt or ridicule; all impostures in religion, as falsely pretending to extraordinary commissions from God, and terrifying or abusing the people with false denunciations of judgments; and all open lewdness grossly scandalous; inasmuch as they tend to subvert all religion or morality, which are the foundation of government, are punishable by the temporal judges with fine and imprisonment, and also such corporal infamous punishment as to the court in discretion shall seem meet, according to the heinousness of the crime (*n*).

Also, seditious words, in derogation of the established religion, are indictable, as tending to a breach of the peace; as these, "Your religion is a new religion; preaching is but prattling, and prayer once a day is more edifying (*o*)."

Depraving
the Christian
Religion by
Words or
Writing.

By the 9 & 10 Will. 3, c. 32, s. 1, if any person, having been educated in or at any time having made profession of the Christian religion within this realm, shall by writing, printing, teaching or advised speaking, deny any one of the persons in the Holy Trinity to be God, or shall assert or maintain there are more gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of Divine Authority, and shall upon indictment or information in any of his majesty's courts at Westminster, or at the assizes, be thereof lawfully convicted by the oath of two or more witnesses, he shall for the first offence be disabled to have any office or employment, or any profit appertaining thereunto; for the second offence shall be disabled to prosecute any action or information in any court of law or equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office for ever within this realm, and shall also suffer imprisonment for the space of three years from the time of such conviction.

Sect. 1. "Provided that no person shall be prosecuted by this act for any words spoken, unless the information thereof shall be given upon oath before a justice of the peace within four

(*n*) 1 Haw. 7.

(*o*) Ibid.

days after such words spoken, and the prosecution of such offence be within three months after such information."

Sect. 3. " Provided that any person, convicted of any the aforesaid crimes, shall for the first offence (upon his acknowledgment and renunciation of such offence or erroneous opinions in the same court where he was convicted, within four months after his conviction) be discharged from all penalties and disabilities incurred by such conviction."

[By 53 Geo. 3, c. 160, s. 2, so much of the 9 & 10 Will. 3, as relates to persons denying as therein mentioned respecting the Holy Trinity, is repealed.—ED.]

3. By the 3 Jac. 1, c. 21, if any person shall in any stage-play, interlude, show, make game, or pageant, jestingly or profanely speak, or use the holy name of God, or of Jesus Christ, or of the Holy Ghost, or of the Trinity, which are not to be spoken but with fear and reverence, he shall forfeit 10*l.*, half to the king, and half to him that shall sue for the same in any court of record at Westminster.

Profaning the
same in Stage
Plays.

4. In the year 1656, James Nailer (*p*), for personating our Saviour, and suffering his followers to worship him, and pay him divine honours, was sentenced to be set in the pillory, and to have his tongue bored through with a red-hot iron, and to be whipped, and stigmatized in the forehead with the letter B.

Nailer's
Case.

5. M., 1 Geo. 2, *The King v. Curl* (*q*). An information was exhibited by the attorney-general, against the defendant, Edmund Curl, for printing and publishing a certain obscene book, setting forth the several lewd passages, and concluding against the peace. It was moved in arrest of judgment, that however the defendant may be punishable for this in the spiritual court, as an offence against good manners, yet it cannot be a libel for which he is punishable in the temporal courts. But after long debate and consideration, the court at last gave it as their unanimous opinion, that this was a temporal offence; and the defendant was set in the pillory.

Curl's Case.

6. E., 2 Geo. 2, *The King v. Woolston* (*r*). He was convicted on four informations for his blasphemous discourses on the miracles of our Saviour. And attempting to prove in arrest of judgment, the court declared they would not suffer it to be debated, whether to write against Christianity in general was not an offence punishable in the temporal courts at common law. They desired it might be taken notice of, that they laid their stress upon the word *general*, and did not intend to include disputes between learned men upon particular controverted points. The next term he was brought up and fined 25*l.* for each of his four discourses, to suffer a year's imprisonment, and to enter into a recognizance for his good behaviour during his life, himself in 3000*l.* and 2000*l.* by others.

Woolston's
Case.

(*p*) 1 Str. Tr. 802.

(*q*) Str. 788.

(*r*) Str. 834.

Annet's Case.

7. M., 3 Geo. 3, *The King v. Peter Annet* (s). The defendant was convicted on an information, for writing a most blasphemous libel in weekly papers, called the Free Inquirer; to which he pleaded guilty. In consideration of which, and of his poverty, of his having confessed his errors in an affidavit, and of his being seventy years old, and some symptoms of wildness that appeared on his inspection in court; the court declared, they had mitigated their intended sentence to the following, viz. To be imprisoned in Newgate for a month; to stand twice in the pillory, with a paper on his forehead, inscribed Blasphemy; to be sent to the house of correction, to hard labour, for a year; to pay a fine of 6s. 8d.; and to find security, himself in 100*l.* and two sureties in 50*l.* each, for his good behaviour during life.

Brother's Case.

In 1794, Richard Brothers, who had been an officer in the navy, styled himself nephew of God, and pretended that he was a prince and a prophet sent to restore the Jews to Jerusalem. He applied many parts of the Revelations to the present times, but predicting in his writings the downfall of monarchy in Europe, the innocence of the prisoners then charged with high treason, the destruction of London, the king, parliament, and British government, he was in March 1795 arrested by a warrant from the secretary of state on suspicion of treasonable practices, and examined before the privy council. Afterwards a commission of lunacy issuing against him, the jury found him a lunatic, and he was confined in a private madhouse. His cause was espoused in the House of Commons by a gentleman of great learning, N. B. Halhed, Esq.

Moxon's Case.

[*Moxon's case*, in the Court of Queen's Bench, Trinity Term, 1841, contains the latest decision on this subject, which was in accordance with the foregoing precedents.

[By 60 Geo. 3 & 1 Geo. 4, c. 8, all copies of blasphemous or seditious publications may, by order of the court or a judge, be seized after the conviction of the offenders; but if judgment be arrested or reversed, they shall be returned.]

Navy.

8. By the 22 Geo. 2, c. 33, art. 2, all flag officers, and all persons in or belonging to his majesty's ships or vessels of war, being guilty of profane oaths, cursings, execrations, drunkenness, uncleanness, or other scandalous actions, in derogation of God's honour, and corruption of good manners, shall incur such punishment as a court martial shall think fit to impose, and as the nature and degree of their offence shall deserve.

For profane cursing and swearing, see title **Swearing**.

Heresy is treated of under the title of that name.

(s) Black. Rep. 395.

Prohibition.

1. <i>When not grantable</i>	387	6. <i>Party dying</i>	400
2. <i>When grantable</i>	393	7. <i>Costs</i>	400
3. <i>What must be done before Ap- plication</i>	395	8. <i>Summary of Cases in which it is grantable, although Original Subject is within the Eccle- siastical Jurisdiction</i> . . .	402
4. <i>When after Sentence</i>	397		
5. <i>Plaintiff's Right to</i>	399		

I. *When not grantable.*

BY the statute of *Circumspectè agatis*, 13 Edw. 1, st. 4, the king to his judges sendeth greeting: Use yourselves circumspectly in all matters concerning the Bishop of Norwich and his clergy, not punishing them if they hold plea in Court Christian of such things as be mere spiritual, that is to wit, of penance enjoined by prelates for deadly sin, as fornication, adultery, and such like, for the which sometimes corporal penance, and sometimes pecuniary is enjoined, specially if a freeman be convict of such things: Also if prelates do punish for leaving the churchyard unclosed, or for that the church is uncovered, or not conveniently decked: in which case none other penance can be enjoined but pecuniary: *Item*, if a parson demand of his parishioners oblations or tithes due and accustomed; or if any parson do sue against another parson for tithes greater or smaller, so that the fourth part of the value of the benefice be not demanded: *Item*, if a parson demand mortuaries (*t*), in places where a mortuary hath been used to be given: *Item*, if a prelate of a church, or a patron, demand of a parson a pension due to him; all such demands are to be made in a spiritual court. And for laying violent hands on a clerk, and in cause of defamation, it hath been granted already, that it shall be tried in a spiritual court, when money is not demanded, but a thing done for punishment of sin; and likewise for breaking an oath: In all cases afore rehearsed, the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.

Not grantable
in Cases
merely Spirit-
tual.
General Prin-
ciples on
which it is
grantable.

In all Matters concerning the Bishop of Norwich, and his Clergy.—The Bishop of Norwich is here put only for example; but it extendeth to all the bishops within this realm (*u*). The said act having been on petition of the Bishop of Norwich; as, generally, acts of parliament in ancient times were founded on antecedent petitions.

Of such Things as be mere Spiritual.—Not having any mixture of the temporalities; as heresy, schisms, holy orders, and the like (*x*).

(*t*) [*Johnson v. Oldham*, Lord Raym. 609; 12 Mich. Term, 12 Will. 3.]

(*u*) 2 Inst. 487.
(*x*) 2 Inst. 488; [*Clare Hall v. Orwin*, Dick. 457.]

So that the fourth Part of the Value of the Benefice be not demanded.—So as at this day, in case where one parson of the presentation of one patron demands tithes against another parson of the presentation of another patron in Court Christian, amounting to a fourth of the value of the benefice; the right of tithes at this day is to be tried at the common law (*y*).

[A prohibition shall not be granted where it is not material (*z*); but courts of law and equity supervise the acts of the spiritual court, when they are incidental to their own determinations; and therefore if the spiritual court prove an act *inter vivos*, they will consider it as void, and *coram non judice* as much as if it proved a will relative to lands only (*a*). The judgments of the Ecclesiastical Court are as much subject to the equity of the Court of Chancery as the judgments at law; and the Lord Chancellor, it has been said, will in some cases relieve a party who has no remedy by appeal (*b*).

Not where
the Jurisdic-
tions are con-
current.

[In cases in which chancery and the spiritual courts have a concurrent jurisdiction, chancery will not hinder the spiritual courts, being first possessed of a case, from proceeding in it (*c*). The temporal courts have held a similar doctrine, or (if the expression concurrent jurisdiction be not strictly applicable to courts existing for different purposes) they have refused a prohibition where the whole matter of the issue has been under the cognizance of the spiritual as well as of the temporal courts. Thus tithes after severance have been sued for in the spiritual courts, though liable also to an action for trespass (*d*). Where executors have given a bond for a legacy, the obligee has been held not to be debarred by acceptance of the bond from suing in the spiritual court for a legacy (*e*). A suit has been permitted to be instituted in the spiritual court at York *pro rationabili parte bonorum*, according to the custom of that province, though the party had a remedy at common law (*f*). And in the older books it is also said a pension might be sued for in the Court Christian as well as an action for annuity in the court temporal (*g*). So a prohibition has been refused for proceedings for a nuisance in a churchyard, for though that be a lay fee, the nuisance is of ecclesiastical cognizance (*h*).—ED.]

Not for pro-
ceeding by
the Canon
Law.

It hath been holden, that if the spiritual court do proceed wholly on their own canons, they shall not be at all controled by the common law (unless they act in derogation from it, as by questioning a matter not triable before them, as the bounds of a parish, or the like); for they shall be presumed to be the best judges of their own laws: and therefore in such case, if a

(*y*) 2 Inst. 491.

(*z*) [*Butterworth v. Walker*, 3 Burr. 1689.]

(*a*) [*Pigott v. Janson*, 1 Eden, 469.]

(*b*) [1 Cha. Ca. 200.]

(*c*) [*Nicholas v. Nicholas*, Prec. Chanc. 546.]

(*d*) [Viner's Abridg. Prohib. Cro. Eliz. 843.]

(*e*) [2 Roll. R. 160; 2 Vern. 31.]

(*f*) [2 Lev. 128.]

(*g*) [Com. Dig. Prohib.; Cro. Eliz.

(*h*) [Viner, Dig. Prohib.]

person is aggrieved, his proper remedy is not by prohibition, but by appeal (*i*).

In case the principal matter belong to the cognizance of the spiritual court, all matters incidental (though otherwise of a temporal nature) are also cognizable there; and no prohibition will lie, provided they proceed in the trial of such temporal incident, according to the rules of the temporal law; but if otherwise it lies even after the sentence, although the objection do not appear upon the face of the libel, but is collected from the whole of the proceedings (*k*).

Not for trying
Temporal In-
cidents by
the Rules of
the Temporal
Law.

Thus in the case of *Shorter v. Friend*, H., 1 Will. 3, an executor being sued for a legacy in the spiritual court, pleaded payment, and offered to prove it by one witness; which the judge refused, and gave sentence against him. Upon this matter suggested, a prohibition was moved for. And by the court: 1. Where the ecclesiastical court proceedeth in a matter merely spiritual, if they proceed in their own manner, though it is different from the common law, no prohibition lieth; as in probate of wills, there if they refuse one witness, no prohibition lieth. 2. Where they have cognizance of the original matter, and an incident happens which is of temporal cognizance, or triable by the common law; they shall try the incident, but must try as the common law would: thus in a suit for tithes, or for a legacy, if the defendant plead a release or payment; or in a suit to prove a will, if the defendant plead a revocation. So in the case at bar; they shall try the matter of payment or no payment, but then they must admit such proof as the common law would, otherwise they reject the cause themselves, and ought to be prohibited. 3. A bare suggestion, that the defendant hath but one witness, and that they take exception to his credit and reputation, is no cause of prohibition; for if they admit the proof of one witness, whether he be a credible witness or not they shall judge, and the party hath no remedy but by appeal (*l*).

[Prohibition lies to the ecclesiastical court if it proceeds to hear exceptions at the suit of a legatee, to an inventory exhibited by an executrix (*m*). Upon an application for a prohibition to prevent the ecclesiastical court from granting administration with the will annexed in the case of a testamentary appointment by a married woman under a doubtful power, the court ordered the party to declare in prohibition (*n*).

[The ecclesiastical court has power to compel churchwardens to deliver in their accounts, but has no jurisdiction to examine them (*o*). A prohibition has been granted to stay a suit in the spiritual court for breaking open a chest in the

(*i*) 1 Haw. 4, 13; Ayl. Par. 171, 438.

(*k*) [*Gould v. Gapper*, 5 East, 345; 1 Smith, 528.]

(*l*) 2 Salk. 547; Ld. Raym. 220.

(*m*) [*Griffiths v. Antony*, 1 N. & Per. 72; S. C. 5 Dowl. P. C. 223.]

(*n*) [*In re Inman*, 1 Scott, N. R. 379.]

(*o*) [*Hooper v. Leach*, 3 Doug. 435.]

church and taking away the title deeds to the advowson (*m*). The spiritual court may order a proctor to refund money which is improperly in his hands (*n*). But prohibition lies to stay a suit for fees of an apparitor, a proctor, or a parish clerk, or a registrar (*o*). But mortuaries (*p*), pensions and oblations, may be sued for in the spiritual court, for such in the statute of Edw. I. express provision is made.—ED.]

Not for a
temporal
consequen-
tial Loss.

A temporal loss, ensuing upon a spiritual sentence, is not of itself cause of prohibition. So it was adjudged in the 42 & 43 Eliz. in the case of *Baker v. Rogers* (*q*), where the deprivation was for simony; on which occasion the reasoning of the court was thus: Although it was said, that in the spiritual court they ought not to have intermeddled to divest the freehold, which is in the incumbent after induction; true it is, they should not meddle to alter the freehold, but they meddled only with the manner of obtaining his presentment, which by consequence divested the freehold from him, by the dissolution of his estate, when his admission and institution is avoided. In like manner, where an incumbent (*r*) was libelled against in the Arches, for not being twenty-three years of age when made deacon, nor twenty-four when made priest, and prayed a prohibition, because a temporal loss (namely, deprivation) might follow; the court denied the prohibition, and compared this case to that of a drunkard, or ill liver, who are usually punished in the ecclesiastical courts, though a temporal loss may ensue; and if prohibitions should be granted in all cases where a temporal loss might ensue, those courts would have little or nothing to do (*s*).

For tempo-
ral Matters
mixt with
spiritual.

M., 1 Ann., *Galizard v. Rigault* (*t*). There was an indictment for assaulting, beating, wounding, and endeavouring to ravish the wife of B., upon which the party was convicted: and afterwards the husband brought an action of trespass, for the same cause: and now the party being also libelled against in the spiritual court for the same fact, namely, for soliciting her chastity, moved for a prohibition to the proceedings in the spiritual court. And it was urged for the jurisdiction of the spiritual court, that they may punish for the solicitation and incontinence, and that this suit was for the health of the soul, the others for fine and damages. But by the court a prohibition was granted; for it being an attempt and solicitation to incontinence, coupled with force and violence, it doth by reason of

Spiritual
Matter
merged in
the tem-
poral.

- | | |
|---|---|
| (<i>m</i>) [<i>Gardner v. Parker</i> , 4 T. R. 351.] | <i>Oxenden</i> , 4 Mod. 255. See title Proctor.] |
| (<i>n</i>) [<i>Morris v. Gardner</i> , 1 Dowl. P. C. 524.] | (<i>p</i>) [<i>Johnson v. Oldham</i> , 1 Ld. Raym. 609.] |
| (<i>o</i>) [<i>Horton v. Wilson</i> , 1 Mod. 167; <i>Pollard v. Gerard</i> , 1 Ld. Raym. 703; <i>Cottingham v. Lofts</i> , 10 Mod. 261, 272, (case 137); <i>Anonym.</i> 12 Mod. 583; <i>Ballard v. Gerard</i> , 1 Salk. 333; <i>Johnson v.</i> | (<i>q</i>) Cro. Eliz. 789.
(<i>r</i>) 3 Mod. 67.
(<i>s</i>) Gibs. 1028.
(<i>t</i>) [See titles Defamation , De-
privation.] |

the force, which is temporal, become a temporal crime *in toto*, as if one say, thou art a whore and a thief, or thou keepest a bawdy house, which are temporal matters, the party shall not proceed in the spiritual court: so if it be said of a woman that she is a bawd only, and not that she keeps a bawdy house: but Holt, Chief Justice, said, if one commit adultery, and the husband bring assault and battery, this shall not hinder the spiritual court, for it is a criminal proceeding there, and no indictment lies at the common law for adultery (u).

But if a man libel for two distinct things, the one of which is of ecclesiastical cognizance, and the other not; a prohibition shall be granted as to that which is of temporal cognizance, and they of the Court Christian shall proceed for the other (x).

On Trial of
Custom,
Modus, or
Prescription.

Hill., 10 Will. 3, *The Churchwardens v. The Rector of Market Bosworth*. The churchwardens libel against the rector, that there hath been time out of mind, and is, a chapel of ease within the same parish; and that the rector of the said parish for time out of mind hath repaired and ought to repair the chancel of the said chapel; and that the chancel being out of repair, the defendant being rector hath not repaired it. The rector in the said court denied the custom. And a decree was made for the rector, that there was no such custom, and costs were taxed there for the said rector. The churchwardens moved for a prohibition; and it was argued for the prohibition that it ought to be granted, because it appears that the libel is upon a custom, which the defendant hath denied; and it may be the question was in the spiritual court, custom or not, which is not triable there, but at the common law; and then this appearing upon the libel, that the court hath not jurisdiction, a prohibition may be granted after sentence. But all the court held the contrary. For by Holt, Chief Justice: The reason for which the spiritual court ought not to try customs is, because they have different notions of customs, as to the time which creates them, from those that the common law hath: For in some cases the usage of ten years, in some twenty, in some thirty years, make a custom in the spiritual court; whereas by the common law it must be for time immemorial. And therefore since there is so much difference between the laws, the common law will not permit that court to adjudge upon customs, by which in many cases the inheritances of persons may be bound. But in this case, that reason fails: for the spiritual court is so far from adjudging that there is any such custom which the common law allows, that they have adjudged that there hath not been any custom allowed by their law, which allows a less time than the common law to make a custom. And the plaintiffs having grounded their libel upon a custom which was well grounded if the custom had not been

(u) 2 Salk. 552.

538; *Carslatee v. Mapledoram*, 2

(x) *Pense v. Prouse*, *Ld. Raym.* T. R. 473.
59; *Free v. Burgoyne*, 6 B. & C.

On Trial of
Custom,
Modus, or
Prescription.

denied (for libels there may be upon customs), but the custom being denied and found no custom, it is not reason to prohibit the court in executing their sentence against the plaintiffs. For the design of a motion for a prohibition, is only to excuse the plaintiffs from costs. And there is no reason but that they ought to pay them; since it appears, that they have vexed the defendant without cause. And therefore a prohibition was denied (*y*).

[Where a custom for a church rate is pleaded in the ecclesiastical court, and the plea admitted, they may proceed to try the custom; but if denied, a prohibition lies (*z*).—ED.]

T., 12 Will. 3, *Jones v. Stone* (*a*). David Jones, the vicar of N., was libelled against in the spiritual court, for that by custom time out of mind, the vicars of N. had, by themselves or others, said and performed divine service in the chapel of Chawbury, for which there was such a recompense, and that he neglected. The defendant came for a prohibition, and without traversing this custom, suggested that all customs were triable at common law. And it was urged, that it was enough for a prohibition, that a custom appeared to charge the vicar with a duty, for which he was not liable of common right. But by Holt, Chief Justice: A parson may be bound to an ecclesiastical duty by custom, and when he is bound by custom, the spiritual court may punish him if he neglects that duty; the custom might have a reasonable commencement by composition in the spiritual court, and begin by an ecclesiastical act; and a bare prescription only is not a sufficient ground for a prohibition, unless it concerns a layman; whereas here it is an ecclesiastical right, an ecclesiastical person, and an ecclesiastical duty, and the prescription not denied.

[Wherever a *modus* or prescription is set up by plaintiff, or pleaded by defendant, or if it (*b*) appears in his personal answer to the spiritual court, a prohibition lies.—ED.]

On the Con-
struction of
Acts of
Parliament.

When the issue of a matter depending in the spiritual court, is determined or influenced by any statute, a prohibition lieth. [But, as will be seen in the next section of this chapter, it is now clear law that the misconstruction of an act of parliament is ground for *appeal*, not for *prohibition*.—ED.]

In some of the books there is an intimation, that not only all statutes whatever are to be interpreted by the temporal courts, but also that when a statute is made, giving remedy in a matter of ecclesiastical cognizance, the very making of such statute doth *ipso facto* take the right of jurisdiction from the spiritual court, and transfer it to the temporal; if there is not a special saving in the act to preserve the spiritual jurisdiction. But to this the rule laid down by Lord Coke (which is also

(*y*) Ld. Raym. 435.

(*z*) [*Dunn v. Coates*, 1 Atk. 288;
5 B. & C. 1.]

(*a*) 2 Salk. 550.

(*b*) [*Burdeaux v. Dr. Lancaster*

et alt. 1 Salk. 333; *French v. Trask*,
10 East, 348.]

generally followed by the books) is a full answer: — An act of parliament being in the affirmative doth not abrogate or take away the jurisdiction ecclesiastical, unless words in the negative be added, as *and not otherwise*, or *in no other manner or form*, or to the like effect (c). [And generally, where the suit is cognizable by the ecclesiastical court, it will be presumed by the temporal courts that they will administer the law correctly (d).—ED.]

Prohibitions are not to be granted on the last day of the term. So is the rule set down in the books: to which Rolle adds, nor on the last day save one: and the reason of both is, that there would not be time for notice to be given to the other side. But it is added in Latch, that upon motion, on the last day of the term, there may be a rule to stay proceedings till the next term (e).

Not on the last Day of the Term.

[As prohibitions used to go to the High Court of Delegates (f) and to the Court of Review (g) as to Ecclesiastical Courts, it would appear that the superior courts of Westminster are competent to issue a prohibition even to the Judicial Committee of the Privy Council, if they manifestly exceed their jurisdiction, or do any thing contrary to the general law of the land. But the Queen's Bench has refused to issue a *mandamus* to that court to receive a petition for the rehearing of an appeal (h); or to prohibit them from hearing a cause of church rate (i) (appealed from the Arches), on the mere ground that the rate was retrospective and bad.

Judicial Committee of Privy Council.

[II. When grantable.

[The stat. 27 Geo. 3, c. 44, limiting the proceedings in the Ecclesiastical Courts for incontinence to eight months from the time of the offence committed, applies to laymen and clergymen; but where a clergyman was proceeded against for incontinence after this period had elapsed, a prohibition was awarded as to proceedings for reformation of manners, but a consultation granted for deprivation (k).

[It has been held as settled law, since Lord Ellenborough's elaborate judgment in *Gould v. Gapper* (l), that the misconstruction of an act of parliament by the Ecclesiastical Courts in the decision of a case within their jurisdiction, is matter of prohibition, and not of appeal. It seems also to be established, that such prohibition will not be granted before the

Not for Misconstruction of Act of Parliament.

(c) Gibs. 1028.

(d) [Griffin v. Ellis, 3 Per. & D. 398.]

(e) Gibs. 1029.

(f) [Rebow v. Bickerton, Bunb. 61; Brabin v. Trediman, 2 Roll. 24.]

(g) [4 Inst. 341.]

(h) [Ex parte Smyth, 2 Crompt. M. & R. 748; 3 Ad. & Ell. 719.]

(i) [Reg. v. Judicial Committee of Privy Council, 3 Nev. & Per. 15.]

(k) [Free v. Burgoyne, 9 D. & R. 14. See titles *Defamation* and *Deprivation*.]

(l) [Gould v. Gapper, 5 East, 345; 1 Smith, 528 (cited above), contains an enumeration of all the preceding cases on this subject.]

decision of the ecclesiastical judge has been actually given, as the temporal courts will not presume that it will be an erroneous construction of the statute; nor will they presume that it will exceed its jurisdiction (*e*).

Where Statutes create the Jurisdiction of the Ecclesiastical Court.

[Where the power of the Ecclesiastical Court is derived from a statute, the exercise of it is strictly limited. Thus the requisition by 21 Hen. 8, c. 5, s. 4, that the executor shall "make a true and perfect inventory, and deliver it into the keeping of the ordinary:" it has been held that the bishop's office is merely ministerial, that he cannot hear objections to the inventory, for had the statute meant to invest him with larger power, it would have said so in direct words (*f*). But where a party cited as resident within the ecclesiastical jurisdiction had appeared and pleaded without objection, he was not allowed afterwards to put the fact in issue, nor in such a case was an intervener allowed to raise an objection on this ground to the jurisdiction (*g*).

When Prohibition will be immediately granted.

[But if it appear *on the face of the proceedings*, in the Ecclesiastical Court, that they are about to exceed their jurisdiction, and try matters which are triable only at common law, the court of common law will grant immediate prohibition, and not wait till the parties have incurred the expense of further proceedings (*h*).—ED.]

On a refusal of a Copy of the Libel.

T., 2 Anne. By Holt, Chief Justice, it was formerly held, by all the judges of England, that when there was a proceeding *ex officio* in the Ecclesiastical Court, they were not bound to give the party a copy of the articles; but the law is otherwise, for in such cases, if they refuse to give a copy of the articles, a prohibition shall go until they deliver it; and accordingly upon motion, a prohibition was granted in the like case by Holt, Chief Justice, and the court (*i*).

[Such a prohibition is usually called a prohibition *quousque*, as distinguished from an absolute prohibition to proceed at all in the matter (*j*).—ED.]

On a collateral Surmise.

Prohibition may be granted upon a collateral surmise; that is, upon a surmise of some fact or matter not appearing in the libel. It was heretofore a petition of the clergy to the king in parliament, that no prohibition might be granted, without first showing the libel; and it was a complaint of Archbishop Bancroft, in the time of King James the First, that prohibitions

(*e*) [9 B. & C. 851; *Blackett v. Blizzard and another*, compare with 7 Ad. & Ell. 726; 2 Add. & Ell. 45; *Ex parte Law*, and the recent case, *Hall v. Maule*, 3 N. & Per. 459; but see also the case of *Blunt v. Harwood*, 3 N. & Per. 577.—ED.]

(*f*) [*Griffiths &c. v. Antony &c.*, 5 Ad. & Ell. 623.]

(*g*) [*Chichester v. Donegal*, 6 Madd. 375. For the statute of

citations, see title *Practice, Citation*.]

(*h*) [*Byerley v. Windus* (Bailey, J.), 5 B. & C. 21; *French v. Trask*, 10 East, 350.]

(*i*) [*Anon.* Ld. Raym. 442, where it is said that 2 Hen. 5, s. 1, c. 3, does not extend to the Admiralty Court; Salk. 553; *Anon.* 6 Mod. 308.]

(*j*) [10 East, 350.]

were granted without sight of the libel, which (as it was there said) is the only rule and direction for the due granting of a prohibition, because upon diligent consideration thereof it will easily appear, whether the cause belong to the temporal or ecclesiastical cognizance; as, on the other side, without sight of the libel, the prohibition must needs range and rove with strange and foreign suggestions, at the will and pleasure of the deviser, nothing pertinent to the matter in demand. To this charge of granting prohibitions without sight of the libel, the judges in their answer say nothing; but as to granting them upon suggestion of matters not contained in the libel, their words are these:—Though in the libel there appear no matter to grant a prohibition, yet upon a collateral surmise the prohibition is to be granted; as, where one is sued in the spiritual court for tithes of *sylva cædua*, the party may suggest, that they were gross or great trees, and have a prohibition, yet no such matter appeareth in the libel; so if one be sued there for violent hands laid on a minister by an officer, as a constable, he may suggest that the plaintiff made an affray upon another, and he to preserve the peace laid hands on him, and so have a prohibition: and so in very many other like cases; and yet upon the libel no matter appeareth why a prohibition should be granted (*k*).

H., 13 Will. 3. Libel in the spiritual court by the husband and wife, for calling the husband cuckold: ruled by Holt, Chief Justice, that a prohibition shall go, because they cannot both sue in that court for that word, but the wife only, the imputation being upon her; and the husband and wife by the law spiritual may not join in suit in the Ecclesiastical Court as they must do in the temporal, but each shall sue separately upon their own cause of action (*l*).

On the Husband's suing on the Wife's Cause of Action.

III. *What must be done before Application for Prohibition.*

The suggestion must have been moved and rejected in the spiritual court, before it can be admitted in the temporal court. In *The Bishop of Winchester's case* (*m*) it was held, that in a suit for tithes in the spiritual court a man may have a prohibition, suggesting a prescription or modus, before or without pleading; but this seems not to be law. For in the 12 Will. 3, a prohibition was moved for, suggesting a custom. But it was denied by Holt, Chief Justice, and the court, unless they pleaded it below, because perhaps they might admit the plea. Also in the 10 Will. 3, it was said, by Holt, Chief Justice, that if a modus be pleaded in the spiritual court, and admitted, no prohibition shall go; but if the question be, whether a modus or no modus,

Suggestion to be first moved in the Spiritual Court.

(*k*) Gibs. 1027; *vid.* 2 Inst. 607; (l) 3 Salk. 288.
[9 B. & C. 851; *Blackett v. Blizzard*, (m) 2 Co. 45.
compare with 7 Ad. & Ell. 726.]

a prohibition shall go; and so is the law, viz. wherever the matter which you suggest for a prohibition is foreign to the libel, you must plead it below before you can have a prohibition, otherwise, where the cause of prohibition appears on the face of the libel (*n*).

Affidavit to
be made of
the Suggestion.

M., 4 Anne, *Burdett v. Newell* (*o*). A rule was made to show cause why a prohibition should not be granted to stay a suit against the plaintiff in the court of the archdeacon of Litchfield for not going to his parish church nor any other church on Sundays or holidays, nor receiving the sacrament thrice a year, upon suggestion of the statute of Elizabeth and the Toleration Act, and then qualifying himself within that act, and alleging that he pleaded it below, and that they refused to receive his plea. It was showed for cause, that this fact was false, and the plaintiff was not a dissenter, nor had qualified himself as above, and therefore it was moved, that the court would not allow the rule to stand, unless they had an affidavit of the fact; for by that means any person might come and suggest a false fact, and oust the spiritual court of their jurisdiction. Which was agreed to by the court, and therefore the rule was discharged.

And, by Holt, Chief Justice, the distinction is this:—Where the matter suggested appears upon the face of the libel, we never insist upon an affidavit; but, unless it appear upon the face of the libel, or if you move for a prohibition as to more than appears on the face of the libel to be out of their jurisdiction, you ought to have affidavit of the truth of the suggestion (*p*). Where it is necessary to suggest a particular fact to the court, as a custom, it must be verified by affidavit (*q*).

Strict Proof
of the Suggestion
not necessary.

It is said, the suggestion need not be precisely proved in order to obtain a prohibition. For where the suggestion was for a modus for lamb and wool, though the proof failed as to the wool, and it was urged that therefore they had failed in the whole, yet a prohibition was granted. And in the case of *Austen v. Pigot*, it was said, that the proof in a prohibition need not be so precise, but if it appears that the Court Christian ought not to hold plea thereof, it sufficeth (*r*). For the court will refuse a consultation if any modus be found, though different from that laid; but, at the same time, if the modus be not proved as laid by the plaintiff in prohibition, there must be a verdict for the defendant, who is entitled to costs (*s*).

But if the suggestion appears to the court to be notoriously false, they will not grant a prohibition; for, by Holt, Chief

(*n*) [*Jones v. Stone*,] 2 Salk. 551.

(*o*) [See also *Johnson v. Oldham*, 609;] Ld. Raym. 1211.

(*p*) 2 Salk. 549.

(*q*) *Caton v. Burton*, Cowp. 330.

(*r*) Gibs. 1029; *Austen v. Pigot*, Cro. Eliz. 736.

(*s*) *Brock v. Richardson*, 1 T. Rep. 427.

Justice, they ought to examine into the truth of the suggestion, and see what foundation it hath (*t*).

Lord Coke says, the suggestion for a prohibition may be traversed in the temporal court (*u*). Suggestion traversable.

And Dr. Watson says, if the suggestion for a prohibition contains no other matter upon which a prohibition ought to be granted to the spiritual court besides the refusal of a plea there, which by the common law is a good plea and ought to have been allowed, in such case the refusal is traversable. Therefore supposing that a *modus decimandi*, or a prescription of a manner of tithing, is triable in the spiritual court, if in a suit there for a *modus decimandi* another modus be pleaded, or that there is no such modus, and that plea is refused; or if in a suit for tithes of lands not tithe-free, a prescription is pleaded as to the manner of tithing, and that plea is refused; and a prohibition is moved for upon suggestion of such refusal, the refusal being the principal matter of the suggestion, is therefore traversable (*x*).

IV. When after Sentence.

T., 10 Will. 3, *Gardner v. Booth* (*y*). Where it doth appear in the libel, or by the proceedings in the cause, that the cognizance of the cause doth not belong to the spiritual court, a prohibition may be moved for and granted after sentence; and this holds in all cases but where one is sued out of his diocese, for there, if he doth not take advantage of it before sentence, he shall not have a prohibition after sentence; and the reason is, for that the cause doth belong to the spiritual court, and though it doth not belong to that spiritual court, it belongs to some other, and not to the king's temporal court. May be after Sentence.

So in the case of *Parker v. Clarke*, M., 3 Anne (*z*), the clerk of a parish libelled against the churchwardens, for so much money due to him by custom every year, and to be levied by them on the respective inhabitants in the said parish; and after sentence in the spiritual court, the defendants suggested for a prohibition, that there was no such custom as the plaintiff had set forth in his libel. It was objected against granting the prohibition, that it was now too late, because it was after sentence, especially since the custom was not denied; for if it had, and that court had proceeded, then, and not before, it had been proper to move for a prohibition. But by Holt, Chief Justice:—It is never too late to move the King Bench for a prohibition where the spiritual court hath no original jurisdiction, as they had not in this case, because the clerk of a

(*t*) [*Smith v. Wallett*, Ld. Raym. 587. It was held in this case that a spiritual court cannot try the existence of a vicarage.—ED.]

(*u*) 2 Inst. 611.

(*x*) Wats. c. 57, *in fine*. See also *Peters v. Prideaux*, 3 Keb. 332.

(*y*) 2 Salk. 548.

(*z*) 6 Mod. 252; 3 Salk. 87.

parish is neither a spiritual person, nor is this duty in demand spiritual, for it is founded on a custom, and by consequence triable at law; and therefore the clerk may have an action on the case against the churchwardens for neglecting to make a rate, and to levy it, or if it had been levied, and not paid by them to the plaintiff.

General Rule
as to granting
Prohibition
after Sen-
tence.

It is a general rule that a prohibition cannot be had after sentence, unless the want of jurisdiction in the court below appear on the face of the proceedings in it (*b*). But if it appear on the face of the proceedings that the court has exceeded its jurisdiction, a prohibition will be granted even after sentence. Thus, the consistorial court of the Bishop of Norwich having ordered certain churchwardens to deliver in their accounts, but having afterwards examined the accounts and struck a balance, which, they refusing to pay, the judge pronounced them contumacious and excommunicated them, the Court of King's Bench being moved for a prohibition, granted it; for the ecclesiastical court may compel churchwardens to deliver in their accounts, but cannot proceed to examine the different articles (*c*). And where the plaintiff in prohibition properly pleaded a modus to a suit for tithes in the ecclesiastical court of the dean of the cathedral church of Sarum; but the judge of the court by an interlocutory sentence decreed him to answer more fully, from which sentence he appealed, and his appeal was dismissed with costs. The Court of King's Bench granted a prohibition to both courts, in order to stay execution for the costs, for the sentence was not *final*; and it also appeared on the face of the proceedings that the jurisdiction of the ecclesiastical court ceased when the modus was pleaded, and could not re-commence till there was a verdict for the defendant, and a consultation awarded (*d*). But the rule above-mentioned is applicable to those cases only where prohibitions are granted for want of original jurisdiction in the courts below, and not to those cases where they may be had if duly applied for, on account of defect of trial. For where a matter collateral and incidental to a suit arises, which is properly triable at common law as a modus, though the courts of common law would have granted a prohibition before sentence on account of the defect of trial in the ecclesiastical court, they will not grant it after sentence if the defendant there pleaded the modus, and submitted to the trial of it, for by so doing he has waived the benefit of a trial at common law (*e*); and to oust the ecclesiastical court of its jurisdiction it is not enough that a custom or prescription be stated, except it be denied by the other side and the court are proceeding to try it: for it may be immaterial to the question (*f*).

When grant-
able after
Sentence
when Spi-
ritual Court
incidentally
determines
any matter of
Common
Law.

(*b*) *Argyle v. Hunt*, Stra. 187;
Blaquiere v. Hawkins, Doug. 378;
Ladbroke v. Cricket, 2 T. Rep. 649.
(*c*) *Leman v. Goulty*, 3 T. Rep. 3.

(*d*) *Darley v. Cosens*, 1 T. Rep. 552.
(*e*) *Full v. Hutchins*, Cowp. 442.
(*f*) *Dutens v. Robson*, 1 H. Bla. 100.

T., 44 Geo. 3, *Gould v. Gapper* (g). In this case the defendant instituted a suit in the archidiaconal court of Wells, for tithes which he claimed as rector of High Ham, and the court decided in favour of his claim. The plaintiff applied for a prohibition on the ground of a misconstruction of an act of parliament, and the Court of King's Bench held, that where the spiritual court *incidentally* determines any matter of common law cognizance, such as the construction of an act of parliament, otherwise than the common law requires, prohibition lies *after* sentence, although the objection do not appear on the *face of the libel*, but is collected from the whole of the proceedings below. [This case was cited by the counsel for both parties in the case of *The Dean of York v. Archbishop of York, &c.*, as the leading case on the question of prohibitions after sentence. See the end of this section.

[In *Hart v. Marsh*, Mr. J. Patteson said, "It is laid down by several authorities and not denied now, that after sentence, unless the want of jurisdiction be manifest, this court will not interfere (h).

[*Ricketts v. Bodenham* (i). It should seem that the Consistorial Courts, the Court of Arches and Delegates, are superior courts; and after sentence, unless defect of jurisdiction be apparent on the face of the proceedings, it will not be intended.

[In *The Dean of York v. Archbishop of York and Dr. Phillimore*, prohibition was granted after sentence. The court observed, "it had been argued that the sentence was final, and that there was nothing now remaining which this court could prohibit from being done, and that there was not even a continuing court to which our writ could be addressed. These arguments, for obvious reasons, require to be narrowly watched, for they would give effect to unlawful proceedings merely because they were brought to a conclusion. But to the present case they are inapplicable, for on looking to the sentence we find that it admonishes the party not to exercise the functions of dean on pain of the greater excommunication, (and we find, too, that the court was adjourned only when this motion was made), the inflicting of which pain would be the mode of enforcing the sentence, and this we may prohibit. We may also require a revocation of that sentence, according to the several forms, and it is plain that the dean could not apply before sentence, for the sentence of deprivation is the only thing done which is beyond the jurisdiction of the archbishop. Up to that point, his grace unquestionably had power to inquire with a view to ulterior proceedings, and it seems that the lord chancellor discharged an application for a prohibition that had been made to him before sentence upon that very ground (k)." — ED.]

*Dean of
York's Case.*

(g) 5 East, 345.

(h) [5 Ad. & Ell. 602; S. C. 5 Dowl. P. C. 424; and 1 N. & Per.

424.]

(i) [4 Ad. & Ell. 433.]

(k) [See title *Visitation*,]

V. *Plaintiff's Right to a Prohibition.*

Plaintiff may
have a Pro-
hibition.

The plaintiff as well as defendant, in the spiritual court, may have a prohibition to stay his own suit. To this purpose when Archbishop Bancroft alleged that the plaintiff's having made choice thereof, and brought his adversary there into trial, should by all intendment of law and reason, and by the usage of all other judicial places, thereby conclude himself in that behalf; yet the answer of the judges was, that none may pursue in the ecclesiastical court, for that which the king's court ought to hold plea of; but upon information thereof given to the king's courts, either by the plaintiff or by any mere stranger, they are to be prohibited, because they deal in that which appertaineth not to their own jurisdiction (*i*). And in the case of *Worts v. Clyston*, M., 12 Jac. 1, the same thing was declared and adjudged in the Court of King's Bench (*j*).

E., 30 Geo. 2, *Paxton v. Knight* (*k*). This was a question whether a prohibition should be granted to stay proceedings in an ecclesiastical court, in a suit by a Quaker, for a seat in a church; founding his title upon a prescriptive right. In which suit the Ecclesiastical Court had determined against him. And now he came, after sentence below, for a prohibition. (Note, an immemorial prescription was alleged on both sides.) On showing cause against the prohibition, it was urged, that the court will not, after sentence, grant a prohibition, unless the defect of jurisdiction appears upon the face of the libel. And the aforesaid case of *Market Bosworth* was insisted on, where the spiritual court had adjudged against the custom set up; though their law allows a less time than the common law to make a custom: but the prohibition was denied. So here, if the spiritual court will admit less evidence of a prescription than the temporal courts will, and the prescription is nevertheless found to be groundless, it is certain that the party who sets it up can have no reason to come for a prohibition after sentence: and his only reason for it can be (as the court observed in the aforesaid cause) to get clear of those costs, which he hath by his own vexatious suit rendered himself liable to, and which (as was there adjudged) he ought to pay. But the court seemed to think, that if the sentence of the ecclesiastical court was a nullity, their award of costs must be so too. And here are reciprocal prescriptions alleged. And the prescriptive right of the one is determined *for*, though that of the other is determined *against*. They have adjudged the adverse prescription to be a good one, which they could not try, and which they will establish upon less evidence than the common law requires. And Lord Mansfield said, that though he was very sorry that the court were obliged to grant the prohibition (because the party applied for it only to get

(*i*) 2 Inst. 607.

(*k*) Burrow, Mansf. 314.

(*j*) Gibs. 1027; Cro. Jac. 350.

rid of paying the costs occasioned by his own vexatious suit), yet he thought they could not avoid doing it. And the rule for a prohibition was made absolute.

VI. *Party dying.*

If the defendant in a prohibition die, his executors may proceed in the spiritual court, and the judges of that court, out of which the prohibition was granted, will also in such case make a rule to the spiritual court to proceed: but the plaintiff may, if he pleaseth, have a new prohibition against the executors (*l*). Party dying.

VII. *Costs.*

A prohibition takes off the costs assessed upon an appeal, where the cause is returned to the inferior court. This was adjudged, E., 7 Car. 1, in the case of *Crompton v. Waterford*, where an appeal had been to the Delegates, who overruled it, and assessed costs for the wrong appeal: And the court agreed with Richardson, that because a prohibition stays all proceedings, the costs were taken away; and added, that if the party was excommunicate he should be absolved (*m*). Costs.

By the statute of the 8 & 9 Will. 3, c. 11, s. 3, "In suits upon prohibitions, the plaintiff obtaining judgment or any award of execution, after plea pleaded, or demurrer joined therein, shall recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same (*n*).

H., 4 Geo., *Sir Henry Houghton v. Starkey* (*o*). After judgment for the plaintiff in prohibition, the question was, what costs ought to be allowed; and whether they should be computed from the first motion, or only from the declaration, was the doubt. Upon search, it was found to be the course of all the courts, to tax only from the time of declaring, except in two instances: the one in the case of *Eads v. Jackson*, in the 2 Geo. 1, and the other in the case of *Brown v. Turner*, where they were allowed from the first motion. And of this opinion were all the judges. And all the officers were directed for the future to allow the costs of the first motion. And afterwards, H., 12 Geo. 1, between *Swetnam* and *Archer*, it was stated in the same manner, and agreed to be the uniform practice ever since. And E., 1 Geo. 2, between *Sir Thomas Bury* and *Cross*, the same doubt was raised by a new master, and the court ordered costs from the first motion.

(*l*) Wats. c. 55.

(*m*) Hetl. 167; Litt. 365; Gibs. 538.]

1029.

(*n*) [1 B. & A. 157; 6 B. & C.

(*o*) Str. 82.

M., 10 Geo. 2, *Middleton v. Croft* (p). The plaintiff in prohibition having prevailed in one point, although he failed in all the rest, moved for costs, and it was moved that they might be taxed from the time of the first motion, according to several determinations. And this last was acquiesced in, if the court should be of opinion for costs. As to which it was objected, that the point in which the plaintiff prevailed was not the gist of the proceedings, but only a circumstance; and that it would be very hard, that they who had prevailed upon the merits should pay costs. But by the court: "The words of the act are not to be got over, which give costs to the plaintiff, if he obtains any judgment: and this matter was under consideration in the House of Lords in *Dr. Bentley's case*, where the prohibition stood as to some articles, and there was a consultation for the rest: to be sure it will be considered in the *quantum*, but we cannot deny costs."

H., 14 Geo. 2, *Gegge v. Jones* (q). Upon showing cause against a prohibition, the court made the rule absolute, with a direction that the plaintiff should declare in prohibition. He tendered a declaration, but the defendant refused it, and applied to stay proceedings, as being willing to submit. The other insisted he had a right to go on, and so get the costs of the motion, which he could not otherwise have. But the court stayed the proceedings without costs; saying, the direction to declare was in favour of the defendant, who might waive it.

1 Will. 4,
c. 21.

[The preamble of 1 Will. 4, c. 21, states, "that it is expedient to make some better provision for payment of costs in cases of prohibition;" and provides by its first section, "that the party in whose favour judgment shall be given, whether a nonsuit, verdict or demurrer, or otherwise, shall be entitled to the costs attending the application and subsequent proceedings, and have judgment to recover the same (r)."] In a recent case in the Consistorial Court of Rochester, an application was made that the costs incurred by fruitless attempts to obtain a prohibition might be included in the costs of proceedings for a church rate in the Ecclesiastical Court, and be paid before the person in contempt was discharged. The judge(s) refused the application. (Nov. 1840). See title *Practice*.]

VIII. *Summary of Cases in which it is grantable, although Original Subject is within Ecclesiastical Jurisdiction.*

[In summing up the opinion of the Exchequer Chamber on *The Braintree Church Rate case* (t), C. J. Tindal observed, on the question as to whether there should not have been an appeal, instead of an application for a prohibition, "The

(p) Str. 1062.

(q) Str. 1114.

(r) [See 5 B. & A. 458.]

(s) [Dr. Lushington.]

(t) [See *Church Rate*.]

question is, whether the Spiritual Court, having admitted the libel of the churchwardens to proof, that is, in effect, having decided upon the validity of such rate, the libel itself showing upon the face of it that the rate is a nullity at the common law, the Queen's writ of prohibition may issue. And we are all of opinion that, in such a case, the writ of prohibition well lies.

[“As to the decided cases, it appears that prohibitions have been granted when the Ecclesiastical Court is proceeding to compel a person to contribute to the repair of a parish church as an inhabitant whose land in the parish is in lease; or where a person is charged in the parish where he inhabits, in respect of land out of it; or, when a man who takes a standing in the market in one parish, but dwells in another, is sued for the repairs of the church of the former parish; or, where one is rated in respect of land for ornaments; or, when the rate is on some of the inhabitants only; or, when the suit is to enforce an ancient rate, made some time before, which had been made originally by commissioners of the Ecclesiastical Court; or, when the bishop's commissioners made a rate and the suit was to enforce it; or, when the rate was made by the churchwardens, without calling together the parishioners; or, for a parish rate, for making and repairing a parish organ. In all these and many other cases, the prohibition was allowed to issue; although no one doubts but that the whole subject matter of church rates, and the enforcing of them, is within the jurisdiction of the Spiritual Courts. In all these cases, too, the same argument would have applied, which has been urged in the present case before us, viz., that the objection is a proper matter of appeal, and not of prohibition; for that it is not to be assumed that the Ecclesiastical Court will do wrong. What real distinction indeed can be made between a rate that is held to be void on the ground of its being imposed by the bishop's commissioner, and a rate that is imposed by the mere authority of the churchwardens?”—ED.]

To conclude, Sir Simon Degge observeth(*u*), that prohibitions of themselves are excellent things, where they are used upon just, legal and true grounds, and have often avoided the usurpation of the popes and spiritual courts. But by the corruption of these later times, they are grown very grievous to the clergy (in the recovering of their tithes and other rights), being too often granted upon feigned and untrue suggestions, which it is impossible the judges should foresee without the spirit of prophecy. And, he adds, I think I may presume to say, that where one was granted before Queen Elizabeth's time, there have been a hundred granted in this last age. And they are a very great delay and charge to the clergy; and it were well (says he) in my poor judgment, if the reverend

(*u*) Degge, p. 2, c. 26.

judges would think of some way to restrain them, or to make them pay well for their delay, by making the plaintiff enter into recognizance to pay such costs as the court out of which they issue should award, in case they should not prove their suggestion in convenient time: or some such other course as they in their great wisdom shall think just and meet.

Consultation.

The practice of the courts of common law, in granting prohibitions, was seriously complained of in the reign of James I. by Archbishop Bancroft, who, in the name of the whole clergy, exhibited to the privy council against the judges "certain articles of abuses which were desired to be reformed in granting of prohibitions;" but his objections were fully answered by them (*v*). If a prohibition be improperly obtained by an untrue suggestion, a consultation will be awarded, which remits the cause to the proper jurisdiction (*w*). And our judges have said "it is a rule not to grant a prohibition where the proceedings in ecclesiastical courts are not against the law of the land and the liberty of the subject (*x*)."
For according to Mr. J. Blackstone (*y*), as on the one hand the courts of Westminster lend the ecclesiastical courts a parental assistance in aiding the compulsive powers of their jurisdiction; so on the other they are obliged sometimes to exercise a parental authority by restraining those powers within their proper limits (*z*).

Note, **Consultation** is treated of under the title of that name.

Provisors—See **Courts**.

Psalmody—See **Public Worship**.

Public Notary—See **Notary Public**.

Public Worship.

- | | |
|---|---|
| 1. <i>Due Attendance on the Public Worship</i> 404 | 4. <i>Performance of the Divine Service, in the several Parts thereof</i> 435 |
| 2. <i>Establishment of the Book of Common Prayer</i> 408 | 5. [<i>Act 1 Vict. c. 45, as to Notices in Church</i>] 447 |
| 3. <i>Orderly Behaviour during the Divine Service</i> 431 | |

I. *Due Attendance on the Public Worship* (*a*).

All Persons
shall resort to
Church.

BY can. 90, the churchwardens or questmen of every parish, and two or three more discreet persons, to be chosen for

(*v*) 2 Inst. 601.

(*w*) See **Consultation**.

(*x*) Cro. Jac. 431.

(*y*) Vol. 3, p. 103.

(*z*) For the form of pleadings on a

writ of prohibition, see *Soby v. Molins*, Plowd. 468.

(*a*) See **Dissenters**, **Holidays**, **Lord's Day**, **Ordination**, **Papery**.

sidesmen or assistants, shall diligently see that all the parishioners duly resort to their church upon all Sundays and holidays, and there continue the whole time of divine service; and all such as shall be found slack or negligent in resorting to the church (having no great or urgent cause of absence) they shall earnestly call upon them; and, after due monition (if they amend not), they shall present them to the ordinary of the place.

By the 5 & 6 Edw. 6, c. 1, s. 2, "All persons shall diligently and faithfully (having no lawful or reasonable excuse to be absent) endeavour themselves to resort to their parish church or chapel accustomed, or upon reasonable let thereof, to some usual place where common prayer and such service of God shall be used in such time of let, upon every Sunday and other days ordained and used to be kept as holidays; and then and there to abide orderly and soberly during the time of the common prayer, preaching, or other service of God: on pain of punishment by the censures of the church."

On Pain of
Punishment
by the Cen-
sures of the
Church.

Sect. 3, "And for the due execution hereof, the king's most excellent majesty, the lords temporal, and all the commons in this present parliament assembled, do in God's name require and charge all the archbishops, bishops, and other ordinaries, that they shall endeavour themselves to the utmost of their knowledges, that the due and true execution thereof may be had throughout their dioceses and charges, as they will answer before God for such evils and plagues wherewith Almighty God may justly punish His people for neglecting this good and wholesome law."

By the 1 Eliz. c. 2, s. 14, "All persons shall diligently and faithfully, having no lawful or reasonable excuse to be absent, endeavour themselves to resort to their parish church or chapel accustomed, or upon reasonable let thereof, to some usual place where common prayer and such service of God shall be used, in such time of let, upon every Sunday, and other days ordained and used to be kept as holidays, and then and there to abide orderly and soberly, during the time of the common prayer, preaching, or other service of God there to be used and ministered, on pain of punishment by the censures of the church, and also upon pain that every person so offending shall forfeit for every such offence 12*d.*, to be levied by the churchwardens of the parish where such offence shall be done, to the use of the poor of the same parish, of the goods and lands of such offender, by way of distress."

On Pain of
12*d.*, a Sun-
day.

All Persons.]—Femes covert as well as others (*b*).

Except dissenters qualified by the act of toleration, who resort to some congregation of religious worship allowed by that act (*c*). And persons who shall take the oaths and come

(*b*) Gibs. 291.

(*c*) 1 Will. 3, c. 18, ss. 2, 16.

to some congregation or place of religious worship permitted to Roman Catholics by 31 Geo. 3, c. 32, s. 9.

But they who repair to no place of public worship are still punishable as before that act, or the 31 Geo. 3, c. 32. And if the churchwardens shall happen to present a person, who possibly may go to some other place, the proof thereof rests upon the person presented, and the absence from church justifies the presentment (*d*).

Having no lawful or reasonable Excuse.]—In the case of *Elizabeth Dormer*, an exception was taken to the indictment, because these words were omitted, *not having any lawful or reasonable excuse*; but it was agreed by all, that these words are to come in on the other side, and need not be put into the indictment (*e*).

To their Parish Church.]—If one goes to a customary chapel within the parish, it is a good excuse; but this must be pleaded (*f*).

If the plea in the spiritual court be, that this is not his parish church, and they refuse the plea, a prohibition will be granted; because that court cannot intermeddle with the precincts of parishes (*g*).

Or upon reasonable Let thereof, to some usual Place where common Prayer and such Service of God shall be used in such Time of Let.]—By the common law or practice of the Church of England, no person can be duly discharged from attending his own parish church, or warranted in resorting to another, unless he be first duly licensed by his ordinary, who is the proper judge of the reasonableness of his request, and grants him letters of licence under seal, to be exhibited (as there shall be occasion) in proof of his discharge. Which licences are very common in our ecclesiastical records (*h*).

And there to abide orderly and soberly.]—It is not enough to come unless he also abide; nor enough to abide when he is come, unless he come so as to be present at the several parts of divine service, and also remain there throughout orderly and soberly; the clause being penned conjunctively, and so the guilt and forfeiture incurred by the violation of any one branch (*i*).

Among the constitutions of Egbert, Archbishop of York, one is, that whilst the minister is officiating, if any person shall go out of the church, he shall be excommunicated; and this is taken from a canon of the fourth council of Carthage (*k*).

Sect. 23. “And all archbishops and bishops, and every of their chancellors, commissaries, archdeacons, and other ordinaries having any peculiar ecclesiastical jurisdiction, shall have

(*d*) Gibs. 964.

(*g*) Gibs. 292.

(*k*) Gibs. 964.

(*e*) Gibs. 291.

(*h*) Gibs. 291.

(*f*) Gibs. 292.

(*i*) Gibs. 292.

power to inquire hereof in their visitation, synods, and elsewhere within their jurisdiction at any other time and place, and to take accusation and informations of all and every the things above mentioned, done, committed, or perpetrated, within the limits of their jurisdictions; and to punish the same by admonition, excommunication, sequestration, or deprivation, and other censures and process, in like form as heretofore hath been used in like cases by the queen's ecclesiastical laws."

Sects. 17, 18, 19. "And the justices of assize shall have power to inquire of, hear and determine the same, at the next assizes; and to make process for execution, as they may do against any person being indicted before them of trespass, or lawfully convicted thereof. And every archbishop and bishop may at his liberty and pleasure join and associate himself to the justices of assize, for the inquiring of, hearing and determining the same."

Sect. 22. "And all mayors, bailiffs, and other head officers, of cities, boroughs, and towns corporate, to which justices of assize do not commonly repair, shall have power to inquire of, hear, and determine the same yearly, within fifteen days after the Feast of Easter and St. Michael the Archangel; in like manner and form as the justices of assize may do."

Also by the 3 Jac. 1, c. 4, ss. 27, 28, 29. "If any subject of this realm shall not repair every Sunday to some church, chapel, or usual place appointed for common prayer, and there hear divine service, according to the said statute of the 1 Eliz. c. 2, it shall be lawful for one justice of the peace, on proof to him made by confession or oath of witness, to call the party before him; and if he shall not make a sufficient excuse and due proof thereof to the satisfaction of such justice, he shall give warrant to the churchwarden of the parish where the party shall dwell, to levy 12*d.* for every such default by distress and sale; and in default of distress, shall commit him to prison till payment be made: which forfeiture shall be to the use of the poor of the parish where the offender shall be resident at the time of the offence committed. Provided, that no man be impeached upon this clause, except he be called in question for his said default within one month next after the default made: And that no man being punished according to this branch, shall for the same offence be punished by the forfeiture of 12*d.* on the statute of the first of Elizabeth."

And 1 Eliz. c. 2, s. 24, provided, "that whatsoever persons shall for their offences first receive punishment of the ordinary, having a testimonial thereof under the ordinary's seal, shall not for the same offence eftsoons be convicted before the justices; and likewise receiving for the said offence punishment first by the justices, shall not for the same offence eftsoons receive punishment of the ordinary."

On Pain of
20*l.* a Month.

By the 23 Eliz. c. 1, s. 5, "Every person above the age of sixteen years, which shall not repair to some church, chapel, or usual place of common prayer, but forbear the same contrary to the 1 Eliz. c. 2, and be thereof lawfully convicted, shall forfeit to the queen 20*l.* a month."

And there are many regulations concerning the same, by that and by several subsequent statutes, which being chiefly intended against popish recusants, are more properly treated of under the title *Popery*. And by the Toleration Act, the same shall not extend to qualified protestant dissenters; but no papist, or popish recusant, shall have any benefit by the said Act of Toleration. [See titles *Dissenters* and *Baths*.]

And by the 23 Eliz. c. 1, s. 12, "Every person which usually on the Sunday shall have in his house divine service which is established by the law of this realm, and be thereat himself usually or most commonly present, and shall not obstinately refuse to come to church; and shall also four times in the year at least be present at the divine service in the church of the parish where he shall be resident, or in some other common church or chapel of ease, shall not incur the said penalty of 20*l.* a month for not repairing to church.

Laws for fre-
quentering of
Divine Ser-
vice to con-
tinue in
force.

[But by 31 Geo. 3, c. 32, it is provided, "that all the laws made and provided for the frequenting of divine service on the Lord's day, commonly called Sunday, shall be still in force, and executed against all persons who shall offend against the said laws, unless such person shall come to some congregation or assembly of religious worship permitted by this act, or by an act passed in the first year of the reign of King William and Queen Mary, intituled 'An Act for exempting their Majesty's Protestant Subjects, dissenting from the Church of England, from the Penalties of certain Laws.'"—ED.]

II. *Establishment of the Book of Common Prayer (l).*

Power of the
Church to
decree Rites
and Ceremo-
nies.

Art. 20. "The church hath power to decree rites or ceremonies that are not contrary to God's word."

Art. 34. "It is not necessary that traditions and ceremonies be in all places one, or utterly like; for at all times they have been divers, and may be changed according to the diversity of countries, times, and men's manners; so that nothing be ordained against God's word. Whosoever through his private judgment willingly and purposely doth openly break the tra-

(l) [See L'Estrange's Alliance of Divine Offices, the works of Comber, Wheatley and Mant, on the Common Prayer, Sharp on the Rubric, Sparrow's Rationale of the Common Prayer, Cardwell's Documentary Annals of the Reformed Church of England.—ED.]

ditions and ceremonies of the church, which be not repugnant to the word of God, and be ordained and approved by common authority, ought to be rebuked openly (that other may fear to do the like), as he that offendeth against the common order of the church, and hurteth the authority of the magistrate, and woundeth the consciences of weak brethren. Every particular or national church, hath authority to ordain, change and abolish ceremonies or rites of the church, ordained only by man's authority; so that all things be done to edifying."

Can. 6. "Whoever shall affirm that the rites and ceremonies of the Church of England, by law established, are wicked, antichristian, or superstitious; or such as, being commanded by lawful authority, men who are zealously and godly affected may not with any good conscience approve them, use them, or, as occasion requireth, subscribe unto them: let him be excommunicated *ipso facto*, and not restored until he repent and publicly revoke such his wicked errors."

In the more early ages of the church, every bishop had a power to form a liturgy for his own diocese; and if he kept to the analogy of faith and doctrine, all circumstances were left to his own discretion. Afterwards the practice was, for the whole province to follow the service of the metropolitan church; which also became the general rule of the church. And this Lindwood acknowledgeth to be the common law of the church; and intimates that the use of several services in the same province (as was here in England) was not to be warranted but by long custom (*m*).

Liturgy before the Acts of Uniformity.

The Latin services, as they had been used in England before, continued in all King Henry the Eighth's reign without any alteration; save some rasures of collects for the pope, and for the office of Thomas Becket and of some other saints, whose days were by the king's injunctions no more to be observed; but those rasures or deletions were so few, that the old mass books, breviaries, and other rituals, did still serve without new impressions (*n*).

In the second year of King Edward the Sixth, a liturgy was established by the statute of the 2 & 3 Edw. 6, c. 1, as followeth:

Act of Uniformity of the 2 Edw. 6.

"Whereas of long time there hath been had in this realm of England and in Wales divers forms of common prayer, commonly called the service of the church, that is to say, the use of Sarum, of York, of Bangor, and of Lincoln; and besides the same, now of late much more divers and sundry forms and fashions have been used in the cathedral and parish churches of England and Wales, as well concerning the mattens or morning prayer, and the evensong, as also concerning the

(*m*) Gibs. 259.

(*n*) Ibid.

Act of Uni-
formity of
the 2 Edw. 6.

holy communion commonly called the mass, with divers and sundry rites and ceremonies concerning the same, and in the administration of other sacraments of the church; and albeit the king, by the advice of his council, hath hitherto divers times assayed to stay innovations or new rites concerning the premisses, yet the same hath not had such good success as his highness required in that behalf; whereupon his highness being pleased to bear with the frailty and weakness of his subjects in that behalf, of his great clemency hath not only been content to abstain from punishment of those that have offended in that behalf, but also to the intent a uniform quiet and godly order should be had concerning the premisses, hath appointed the archbishop of Canterbury, and certain other of the most learned and discreet bishops and other learned men of this realm, having respect to the most sincere and pure Christian religion taught by the Scripture, as to the usages in the primitive church, to draw and make one convenient and meet order, rite and fashion of common and open prayer and administration of the sacraments to be had and used in his majesty's realm of England and in Wales; the which, by the aid of the Holy Ghost, with one uniform agreement is of them concluded, set forth and delivered in a book, entitled 'The Book of Common Prayer and Administration of the Sacraments and other Rites and Ceremonies of the Church, after the use of the Church of England:' Wherefore the lords spiritual and temporal, and the commons, in this present parliament assembled, considering as well the most godly travel of the king's highness herein, as the godly prayers, orders, rites and ceremonies, in the said book mentioned, and the considerations of altering those things which be altered, and retaining those things which be received in the said book, and also the honour of God, and great quietness which by the grace of God shall ensue upon the one and uniform rite and order in such common prayer and rites and external ceremonies to be used throughout England and Wales, do give to his highness most hearty and lowly thanks for the same, and humbly pray that it may be enacted by his majesty, with the assent of the lords and commons in parliament assembled, that all and singular ministers in any cathedral or parish church, or other place within this realm, shall be bounden to say and use the mattens, evensong, celebration of the Lord's supper, commonly called the mass, and administration of each the sacraments, and all their common and open prayer, in such order and form as is mentioned in the same book, and none other, or otherwise."

And by the same act divers regulations were made to establish the said book, which are yet in force, not for the establishment of that book, but for the establishment of the present

Book of Common Prayer enjoined by the Act of Uniformity of the 13 & 14 Car. 2, and which therefore remain to be inserted in their due course. For, that I may observe it once for all, the regulations made by the several acts of uniformity for the establishing of the several respective liturgies, are all brought over and enforced by the last act of uniformity for the establishing of the present Book of Common Prayer, by this clause following, viz.—

Last Act of
Uniformity.

13 & 14 Car. 2, c. 4, s. 24, "The several good laws and statutes of this realm which have been formerly made, and are now in force, for the uniformity of prayer and administration of the sacraments, shall stand in full force and strength to all intents and purposes whatsoever, for the establishing and confirming of the said book herein-before mentioned to be joined and annexed to this act, and shall be applied, practised and put in ure for the punishing of all offences contrary to the said laws, with relation to the book aforesaid, and no other."

And by the 3 & 4 Edw. 6, c. 10, s. 1, "All books called antiphoners, missals, grailes, processional, manuals, legends, pies, portuasses, primers in Latin and English, couchers, journals, ordinals, or other books of writings whatsoever, heretofore used for the service of the church, written or printed in the English or Latin tongue, other than such as shall be set forth by the king's majesty, shall be clearly and utterly abolished, extinguished and forbidden for ever to be used or kept in this realm or elsewhere in any of the king's dominions."

Sect. 2. "And if any person or persons, bodies politic or corporate, that shall have in his or their custody any the books or writings of the sorts aforesaid, and do not before the last day of June then next ensuing deliver or cause to be delivered all and every the same books to the mayor, bailiff, constable, or churchwardens of the town where such books then shall be, (to be by them delivered over openly within three months next following after the said delivery, to the archbishop, bishop, chancellor or commissary of the same diocese, to the intent that they cause them immediately after either to be openly burned, or otherwise defaced and destroyed,) he shall for every such book or books willingly retained in hands or custody, and not delivered as aforesaid after the said last day of June, and be thereof lawfully convict, forfeit to the king for the first offence 20s., and for the second offence 4*l.*, and for the third offence shall suffer imprisonment at the king's will."

Sect. 3. "And if any mayors, bailiffs, constables or others, do not, within three months after receipt of the same books, deliver or cause to be delivered such books so by them received, to the archbishop, bishop, chancellor, or commissaries of their diocese; and if the said archbishop, bishop,

chancellor or commissaries, do not within forty days after the receipt of such books, burn, deface and destroy, or cause to be burned, defaced or destroyed the same books and every of them, they and every of them so offending shall forfeit to the king, being thereof lawfully convict, 40*l*. The one half of all which forfeitures shall be to any of the king's subjects that will sue for the same in any of the king's courts of record."

Sect. 4. "And as well justices of assize in their circuits, as justices of the peace within the limits of their commission in the general sessions, shall have power to inquire of, hear and determine the same, in such form as they may do in other such like cases."

Sect. 6. "Provided, that any person may use, keep and have any primers in the English or Latin tongue, set forth by King Henry the Eighth; so that the sentences of invocation or prayer to saints in the same primers be blotted, or clearly put out of the same."

Act of
Uniformity of
the 5 Edw. 6.

Thus stood the liturgy until the fifth year of King Edward the Sixth. But because some things were contained in that liturgy, which showed a compliance with the superstition of those times, and some exceptions were taken to it by some learned men at home, and by Calvin abroad, therefore it was reviewed, in which Martin Bucer was consulted, and some alterations were made in it, which consisted in adding the general confession and absolution; and the communion to begin with the Ten Commandments. The use of oil in confirmation and extreme unction were left out, and also prayers for souls departed, and what tended to a belief of Christ's real presence in the eucharist. And this liturgy so reformed was established by the act of the 5 & 6 Edw. 6, c. 1, s. 5, as followeth:—"Because there hath risen in the use and exercise of common service in the church heretofore set forth, divers doubts for the fashion and manner of the ministration of the same, rather by the curiosity of the minister and mistakers, than of any other worthy cause: therefore, as well for the more plain and manifest explanation thereof, as for the more perfection of the said order of common service, the king, with the assent of the lords and commons in parliament assembled, hath caused the aforesaid order of common service, intituled, 'The Book of Common Prayer,' to be faithfully and godly perused, explained and made fully perfect, and hath annexed and joined it so explained and perfected to this statute: adding also, a form and manner of making and consecrating of archbishops, bishops, priests and deacons, to be of like force, authority and value, as the same like aforesaid book entitled The Book of Common Prayer was before; and with the same clauses of provisions and exceptions to all intents and purposes as by the act of the 2 & 3 Edw. 6, c. 1, was limited and expressed for

the uniformity of service and administration of the sacraments throughout the realm, upon such several pains as in the said act is expressed. And the said former act to stand in full force and strength to all intents and constructions, and to be applied, practised and put in ure, to and for the establishing of the Book of Common Prayer now explained and hereunto annexed, and also the said form of making archbishops, bishops, priests and deacons hereunto annexed, as it was for the former book."

This liturgy was abolished by Queen Mary, who, having called in and destroyed the aforesaid rased books of King Henry the Eighth, required all parishes to furnish themselves with new complete books, and enacted that the service should stand as it was most commonly used in the last year of the reign of the said King Henry the Eighth (*o*).

And for a month and more after Queen Mary's death, the service continued as before, nothing being forbidden but the elevation; but on the 27th day of December following, Queen Elizabeth set forth a proclamation, to charge and command all manner of her subjects, as well those that be called to the ministry of the church, as all others, that they do forbear to preach or teach, or to give audience to any manner of doctrine or preaching, other than to the gospels and epistles, commonly called the gospel and epistle of the day, and to the Ten Commandments in the vulgar tongue, without exposition or addition of any manner of sense or meaning to be applied or added; or to use any other manner of public prayer, rite or ceremony in the church, but that which is already used, and by law received, or the common Litany used at this present in her majesty's own chapel, and the Lord's Prayer and the Creed in English; until consultation may be had by parliament, by her majesty and her three estates of this realm, for the better conciliation and accord of such causes, as at this present are moved in matters and ceremonies of religion (*p*).

After which, in the first year of the same queen, a liturgy was established by act of parliament of the 1 Eliz. c. 2, in this wise:—"Be it enacted, by the queen's highness, with the assent of the lords and commons in this present parliament assembled, that all ministers in any cathedral or parish church, or other place, shall be bounden to say and use the mattens, evensong, celebration of the Lord's supper, and administration of each of the sacraments, and all the common and open prayer, in such order and form as is mentioned in the book authorized by parliament in the 5 & 6 Edw. 6, with one alteration or addition of certain lessons to be used on every Sunday in the year, and the form of the Litany altered and corrected,

Act of
Uniformity of
the 1 Eliz.

(*o*) Gibs. 259.

(*p*) Ibid. 267, 268.

and two sentences only added in the delivery of the sacrament to the communicants, and none other or otherwise." And there was a proviso, "that such ornaments of the church, and of the ministers thereof, shall be retained and used, as was in this Church of England by authority of parliament, in the second year of the reign of King Edward the Sixth, until other order shall be taken therein by the authority of the queen's majesty, with the advice of her commissioners appointed and authorized under the great seal of England for causes ecclesiastical, or of the metropolitan of this realm."

Of the Lords and Commons.]—It was not said *lords spiritual*, in this, or either of the former acts; because all the bishops present dissented (*q*).

The Form of the Litany altered and corrected.]—By the omission of the clause, *from the tyranny of the Bishop of Rome, and all his detestable enormities*; which had been in the second and in the fifth of Edward the Sixth (*r*).

Two Sentences only added in the delivery of the Sacraments.]—Of the two forms now used at the delivery of the bread and wine, the first part of each (to the word *life* inclusive) was in the book of the second year of King Edward the Sixth, but not the second part; but in the book of the fifth year, was the second part without the first: and the alteration made by virtue of this act, was the inserting of both as they now stand (*s*).

Order shall be taken by authority of the Queen's Majesty, with the advice of her Commissioners.]—Two years afterwards, by virtue of this clause, the queen issued her commission to the archbishop, and three others, to peruse the order of the lessons throughout the whole year, and to cause some new calendars to be imprinted; which were finished and sent to the several bishops to see them observed in their dioceses in the month of February, 1560 (*t*).

Canons of
1603 respect-
ing Book of
Common
Prayer.

By canon 36, of the Canons in 1603, "No person shall be received into the ministry, nor admitted to any ecclesiastical living, nor suffered to preach, to catechize, or be a lecturer or reader of divinity in any place, except he shall first subscribe (amongst others) to this article following: That the Book of Common Prayer, and of Ordering of Bishops, Priests and Deacons, containeth in it nothing contrary to the word of God, and that it may be lawfully used, and that he himself will use the form in the said book prescribed, in public prayer and administration of the sacraments, and 'none other.'"

And by canon 56 of the same Canons, "Every minister, being possessed of a benefice that hath cure and charge of souls, although he chiefly attend to preaching, and hath a curate under him to execute the other duties which are to be

(*q*) Gibs. 268.

(*r*) Ibid.

(*s*) Ibid.

(*t*) Ibid.

performed for him in the church, and likewise every other stipendiary preacher that readeth any lecture, or catechizeth, or preacheth in any church or chapel, shall twice at the least every year read himself the divine service upon two several Sundays, publicly, and at the usual times, both in the forenoon and afternoon, in the church which he so possesseth, or where he readeth, catechizeth or preacheth, as is aforesaid, and shall likewise as often in every year administer the sacraments of baptism (if there be any to be baptized), and of the Lord's supper, in such manner and form, and with the observation of all such rites and ceremonies as are prescribed by the Book of Common Prayer in that behalf: which if he do not accordingly perform, then shall he that is possessed of a benefice (as before) be suspended; and he that is but a reader, preacher or catechizer be removed from his place by the bishop of the diocese; until he or they shall submit themselves to perform all the said duties, in such manner and sort as before is prescribed."

After the passing of these canons, King James, in the first year of his reign, by virtue of the aforesaid proviso in the 1 Eliz. c. 2, upon the conference held before the king himself at Hampton Court, gave directions to the archbishop, and other high commissioners, to review the Common Prayer Book; and they did make several material alterations and enlargements of it, as in the office of private baptism, and in several rubrics and other passages, and added five or six new prayers and thanksgivings, and all that part of the catechism which contains the doctrine of the sacraments. And yet the powers specified in that proviso, seem not to extend to the queen's heirs and successors, but to be only lodged personally in the queen; yet the Book of Common Prayer so altered stood in force from the first year of King James, to the fourteenth of Charles the Second (*u*).

King James's
Provisions.

And it is to be observed, that the liturgy of the 13 & 14 Car. 2, is not the same with that which the aforesaid canons do refer to; so that so far forth the said canons as to this matter are not now in force.

In the preface to the Book of Common Prayer, concerning the service of the church (which was also nearly the same in the second and in the fifth of Edward the Sixth): — "There was never any thing by the wit of man so well devised, or so sure established, which in continuance of time hath not been corrupted; as among other things, it may plainly appear by the common prayers in the church, commonly called divine service. The first original and ground whereof, if a man would search out by the ancient fathers, he shall find that the same was not ordained but of a good pur-

Preface to
Book of
Common
Prayer.

pose, and for a great advancement of godliness. For they so ordered the matter, that all the whole Bible (or the greatest part thereof) should be read over once every year; intending thereby that the clergy, and especially such as were ministers in the congregation, should by often reading and meditation in God's word, be stirred up to godliness themselves, and be more able to exhort others by wholesome doctrine, and to confute them that were adversaries to the truth; and further, that the people, by daily hearing of holy Scripture read in the church, might continually profit more and more in the knowledge of God, and be the more inflamed with the love of his true religion.

"But these many years passed, this godly and decent order of the ancient fathers hath been so altered, broken and neglected, by planting in uncertain stories and legends, with multitude of responds, verses, vain repetitions, commemorations, and synodals, that commonly when any book of the Bible was begun, after three or four chapters were read out, all the rest were unread. And in this sort the book of Isaiah was begun in Advent, and the book of Genesis in Septuagesima; but they were only begun and never read through; after like sort were other books of Holy Scripture used. And moreover, whereas St. Paul would have such language spoken to the people in the church, as they might understand and have profit by hearing the same, the service in this Church of England these many years hath been read in Latin to the people, which they understood not; so that they have heard with their ears only, and their heart, spirit and mind have not been edified thereby. And furthermore, notwithstanding that the ancient fathers have divided the psalms into seven portions, whereof every one was called a nocturn; now of late time, a few of them have been daily said, and the rest utterly omitted. Moreover, the number and hardness of the rules called the pie, and the manifold changings of the service, was the cause that to turn to the book only was so hard and intricate a matter, that many times there was more business to find out what should be read, than to read it when it was found out.

"These inconveniences therefore considered, here is set forth such an order, whereby the same may be redressed. And for a readiness in this matter, here is drawn out a kalendar for that purpose, which is plain and easy to be understood; whereof (so much as may be) the reading of Holy Scripture is so set forth, that all things shall be done in order, without breaking one piece from another. For this cause be cut off anthems, responds, invitatories, and such like things, as did break the continual course of the reading of the Scripture.

"Yet because there is no remedy, but that of necessity there must be some rules, therefore certain rules are here set forth: which as they are few in number, so they are plain and easy to be

understood. So that here you have an order for prayer, and for the reading of the Holy Scripture, much agreeable to the mind and purpose of the old fathers, and a great deal more profitable and commodious, than that which of late was used. It is more profitable, because here are left out many things, whereof some are untrue, some uncertain, some vain and superstitious, and nothing is ordained to be read but the very pure word of God, the Holy Scriptures, or that which is agreeable to the same; and that in such a language and order, as is most easy and plain for the understanding both of the readers and hearers. It is also more commodious, both for the shortness thereof, and for the plainness of the order, and for that the rules be few and easy.

“And forasmuch as nothing can be so plainly set forth, but doubts may arise in the use and practice of the same; to appease all such diversity (if any arise) and for the resolution of all doubts, concerning the manner how to understand, do and execute the things contained in this book; the parties that so doubt, or diversely take any thing, shall alway resort to the bishop of the diocese, who by his discretion shall take order for the quieting and appeasing of the same; so that the same order be not contrary to any thing contained in this book. And if the bishop of the diocese be in doubt, he may send for the resolution thereof to the archbishop.

“And although it be appointed, that all things shall be read and sung in the church in the English tongue, to the end that the congregation may be thereby edified; yet it is not meant, but that when men say morning and evening prayers privately, they may say the same in any language that they themselves do understand.”

Stories and Legends.]—That is, concerning the lives of the saints; of whom there being such a number in the Church of Rome, few days are free from the stories and legends they relate of them (*x*).

Respond.]—A short anthem sung, after reading three or four verses of a chapter; after which the chapter proceeds (*y*).

Commemorations.]—The service of a lesser holiday falling in with a greater (*z*).

Synodals.]—Constitutions made in provincial or diocesan synods, and published in the parish churches (*a*).

Nocturn.]—So called from the ancient Christians rising in the night to perform them (*b*).

Pie.]—A table to find out the service belonging to each day; which becomes very difficult, by the coincidence of many offices on the same day (*c*).

Invitatories.]—Some text of Scripture, adapted and chosen

(*x*) Gibs. 263.

(*a*) Ibid.

VOL. III.

(*y*) Gibs. 263.

(*b*) Ibid.

(*z*) Gibs. 263.

(*c*) Ibid.

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for the occasion of the day, and used before the *Venite*; which also itself is called the invitatory psalm (*d*).

In the English Tongue.]—By Art. 24, “It is a thing plainly repugnant to the word of God, and the custom of the primitive church, to have public prayer in the church, or to minister the sacraments, in a tongue not understood of the people.”

And by the 2 & 3 Edw. 6, c. 1, s. 5, it is provided, “that it shall be lawful to any man that understandeth the Greek, Latin and Hebrew tongue, or other strange tongue, to say and have the prayers of mattens and evensong in Latin or any such other tongue, saying the same privately, as they do understand.”

Sect. 6. “And for the encouragement of learning in the tongues, in the universities of Cambridge and Oxford; it shall be lawful to use and exercise in their common and open prayer in their chapels (being no parish churches) or other places of prayer, the mattens, evensong, litany, and all other prayers (the holy communion commonly called the mass excepted) prescribed in the said book, in Greek, Latin or Hebrew.”

And by the 13 & 14 Car. 2, c. 4, s. 18, it is provided, “that it shall be lawful to use the morning and evening prayer, and all other prayers and service prescribed in and by the said book, in the chapels or other public places of the respective colleges and halls in both the universities, in the colleges of Westminster, Winchester and Eton, and in the convocations of the clergy of either province, in Latin.”

And by the same statute, s. 27, “the bishops of Hereford, St. David’s, Asaph, Bangor, and Llandaff, and their successors, shall take order that the said book be translated into the British or Welsh tongue, to be used in Wales where the Welsh tongue is commonly used; and at the same time an English book shall be had there likewise, that such as understand the same may have recourse thereunto, and such as do not understand the same may by conferring both tongues together, the sooner attain to the knowledge of the English tongue.”

And by the 5 Eliz. c. 28, “The bishops are in like manner required to cause the Old and New Testament to be translated into Welch, and to have one English and one Welsh copy in every such respective place.”

Act of Uniformity, 13
& 14 Car. 2.

By the 13 & 14 Car. 2, c. 4, s. 1, (which is the last Act of Uniformity), it is enacted as follows: “Whereas by the neglect of ministers in using the order of Common Prayer, during the time of the late troubles, great mischiefs and inconveniences have arisen; for the prevention thereof in time to come, and for settling the peace of the church, the king, (according to his declaration of the five and twentieth of October, 1660) granted his commission under the great seal, to several bishops and other divines, to review the Book of Common Prayer, and to prepare such alterations and additions as they thought fit to

(*d*) Gibs. 263.

offer: And afterwards the convocations of both the provinces being by his majesty called and assembled, his majesty hath been pleased to authorize and require the presidents of the said convocation, and other the bishops and clergy of the same, to review the said Book of Common Prayer, and the Book of the Form and Manner of the making and consecrating of Bishops, Priests and Deacons; and that after mature consideration, they should make such additions and alterations in the said books respectively, as to them should seem meet and convenient, and should exhibit and present the same to his majesty in writing, for his further allowance or confirmation: since which time, they the said presidents, bishops and clergy of both provinces have accordingly reviewed the said books, and have made some alterations to the same which they think fit to be inserted, and some additional prayers to the said Book of Common Prayer to be used upon proper and emergent occasions; and have exhibited and presented the same unto his majesty in writing in one book, intituled, 'The Book of Common Prayer and Administration of the Sacraments, and other Rites and Ceremonies of the Church, according to the use of the Church of England; together with the Psalter or Psalms of David, appointed as they are to be sung or said in Churches; and the Form and Manner of making, ordaining and consecrating of Bishops, Priests and Deacons:' All which his majesty having duly considered, hath fully approved and allowed the same, and recommended to this present parliament, that the said Books of Common Prayer and of the Form of Ordination and Consecration of Bishops, Priests and Deacons, with the alterations and additions which have been so made and presented to his majesty by the said convocations, be the book which shall be appointed to be used by all that officiate in all cathedral and collegiate churches and chapels, and in all chapels of colleges and halls in both the universities and the colleges of Eton and Winchester, and in all parish churches and chapels throughout the kingdom, and by all that make or consecrate bishops, priests or deacons, in any of the said places, under such sanctions and penalties as the houses of parliament shall think fit."

Act of Uniformity, 13
& 14 Car. 2.

Sect. 2. "Now in regard that nothing conduceth more to the settling of the peace of the nation, nor to the honour of our religion and the propagation thereof, than an universal agreement in the public worship of God; and to the intent that every person within this realm may certainly know the rule to which he is to conform, in public worship and administration of sacraments and other rites and ceremonies of the Church of England, and the manner how and by whom bishops, priests and deacons, are and ought to be made, ordained and consecrated; be it enacted by the king's most excellent majesty, by the advice and consent of the lords spiritual and temporal, and of the

Act of Uniformity, 13 & 14 Car. 2.

commons in this present parliament assembled, that all and singular ministers in any cathedral, collegiate or parish church, or chapel, or other place of public worship, shall be bound to say and use the morning prayer, evening prayer, celebration and administration of both the sacraments, and all other the public and common prayer, in such order and form as is mentioned in the said book, intituled as aforesaid, and annexed and joined to this present act; and that the morning and evening prayers therein contained shall, upon every Lord's day, and upon all other days and occasions, and at the times therein appointed, be openly and solemnly read by all and every minister or curate, in every church, chapel or other place of public worship, as aforesaid."

Granted his Commission under the Great Seal.]—Which bore date March 25th, 1661, and was directed to twelve bishops and twelve presbyterian divines; with nine assistants on each side, to supply the places of the principals, when they should be occasionally absent. In virtue of which commission the commissioners met frequently at the Savoy, and disputations were held, but nothing concluded (e).

Or other Place of Public Worship.]—By the 22 Geo. 2, c. 33, all commanders, captains, and officers at sea, shall cause the public worship of Almighty God, according to the liturgy of the Church of England, to be performed in their respective ships; and prayers and preachings by the chaplains shall be performed diligently.

And by the rubric before the service at sea, the morning and evening service to be used daily at sea shall be the same which is appointed in the Book of Common Prayer.

In such Order and Form as is mentioned in the said Book.]—Provided, that in all those prayers, litanies, and collects, which do any way relate to the king, queen, or royal progeny, the names be altered and changed from time to time, and fitted to the present occasion, according to the direction of lawful authority (f). That is, (according to practice,) of the king or queen in council (g).

Books of Common Prayer to be provided.

By the 1 Eliz. c. 2, s. 19, the Book of Common Prayer shall be provided at the charges of the parishioners of every parish and cathedral church.

This was intended of the Book of Common Prayer, as then established by that act.

By canon 80, the churchwardens or questmen of every church and chapel shall, at the charge of the parish, provide the Book of Common Prayer, lately explained in some few points by his majesty's authority, according to the laws and

(e) Gibs. 275.

(f) 13 & 14 Car. 2, c. 4. s. 25.

(g) Gibs. 280. [See titles *Articles* (vol. i.), and *Deprivation* (vol. ii.),

and the cases of *Newberry v. Goodwin*, 1 Phill. 282; and of *Stone v. King's Proctor*, there cited, 1 Consist. 424.]

his highness's prerogative in that behalf; and that with all convenient speed, but at the furthest within two months after the publishing of these our constitutions.

And this was intended of the same Book of Common Prayer as altered in the conference at Hampton-court as aforesaid.

Finally, by the 13 & 14 Car. 2, c. 4, s. 26, a true printed copy of the (present) Book of Common Prayer, shall at the costs and charges of the parishioners of every parish church and chapelry, cathedral church, college and hall, be provided before the feast of St. Bartholomew 1662; on pain of 3*l.* a month, for so long time as they shall be unprovided thereof.

Act of Uniformity, 13 & 14 Car. 2.

Sect. 28. And the respective deans and chapters of every cathedral or collegiate church were required, at their proper costs and charges, before Dec. 25, 1662, to obtain under the great seal of England, a true and perfect printed copy of this act, and of the said book annexed hereunto, to be by the said deans and chapters and their successors kept and preserved in safety for ever, and to be also produced and showed forth in any court of record as often as they shall be thereunto lawfully required; and also there shall be delivered true and perfect copies of this act and of the same book into the respective courts at Westminster, and into the Tower of London, to be kept and preserved for ever among the records of the said courts, and the records of the Tower, to be also produced and showed forth in any court as need shall require; which said books so to be exemplified under the great seal of England, shall be examined by such persons as the king shall appoint under the great seal of England for that purpose, and shall be compared with the original book hereunto annexed, and they shall have power to correct and amend in writing any error committed by the printer in printing of the same book, and shall certify in writing under their hands and seals, or the hands and seals of any three of them, at the end of the same book, that they have examined and compared the same book, and find it to be a true and perfect copy; which said books so exemplified under the great seal, shall be deemed to be good and available in the law to all intents and purposes, and shall be accounted as good records as this book itself hereunto annexed.

By the 13 & 14 Car. 2, c. 4, s. 6, every person who shall be presented or collated or put into any ecclesiastical benefice or promotion, shall in the church, chapel or place of public worship belonging to the same, within two months next after that he shall be in the actual possession of the said ecclesiastical benefice or promotion, upon some Lord's day, openly, publicly and solemnly read the morning and evening prayers, appointed to be read by and according to the said Book of Common Prayer, at the times thereby appointed or to be appointed; and after such reading thereof, shall openly and

Declaration of Assent thereunto.

Act of Uni-
formity, 13
& 14 Car. 2.

publicly before the congregation there assembled, declare his unfeigned assent and consent to the use of all things therein contained and prescribed, in these words and no other: "I, A. B., do here declare my unfeigned assent and consent to all and every thing contained and prescribed in and by the book, intituled, The Book of Common Prayer and Administration of the Sacraments, and other Rites and Ceremonies of the Church, according to the use of the Church of England, together with the Psalter or Psalms of David, pointed as they are to be sung or said in Churches; and the Form or Manner of making, ordaining and consecrating of Bishops, Priests and Deacons." And every such person, who shall (without some lawful impediment to be allowed and approved by the ordinary of the place) neglect or refuse to do the same within the time aforesaid (or in case of such impediment, within one month after such impediment removed) shall *ipso facto* be deprived of all his said ecclesiastical benefices and promotions; and the patron shall present or collate as if he were dead.

Sects. 19, 20, 21, 22, 23. And every person who shall be appointed or received as a lecturer, to preach upon any day of the week, in any church, chapel or place of public worship, the first time he preacheth (before his sermon) shall openly, publicly and solemnly read the common prayers and service appointed to be read for that time of the day, and then and there publicly and openly declare his assent unto and approbation of the said book, and to the use of all the prayers, rites and ceremonies, forms and orders therein contained, according to the form before appointed in this act; and shall upon the first lecture day of every month afterwards, so long as he continues lecturer or preacher there, at the place appointed for his said lecture or sermon, before his said lecture or sermon, openly, publicly and solemnly read the common prayers and service for that time of the day, and after such reading thereof shall openly and publicly before the congregation there assembled declare his unfeigned assent unto the said book, according to the form aforesaid: and every such person who shall neglect or refuse to do the same, shall from thenceforth be disabled to preach the said or any other lecture or sermon in the said or any other church, chapel or place of public worship, until he shall openly, publicly and solemnly read the common prayers and service appointed by the said book, and conform in all points to the things therein prescribed, according to the purport and true intent of this act. Provided, that if the said lecture be to be read in any cathedral or collegiate church or chapel, it shall be sufficient for the said lecturer, openly at the time aforesaid, to declare his assent and consent to all things contained in the said book, according to the form aforesaid. And if any person who is by this act disabled (or prohibited, 15 Car. 2, c. 6, s. 7) to preach any lecture or sermon, shall

during the time that he shall continue so disabled (or prohibited), preach any sermon or lecture, he shall suffer three months' imprisonment in the common jail: and any two justices of the peace of any county within this realm, and the mayor or other chief magistrate of any city or town corporate within the same, upon certificate from the ordinary made to him or them of the offence committed, shall and are hereby required to commit the person so offending to the jail of the same county, city or town corporate. Provided that at all times when any sermon or lecture is to be preached, the common prayers and service in and by the said book appointed to be read for that time of the day, shall be openly, publicly and solemnly read by some priest or deacon, in the church, chapel or place of public worship where the said sermon or lecture is to be preached, before such sermon or lecture be preached, and that the lecturer then to preach shall be present at the reading thereof. And provided, that this act shall not extend to the university churches, when any sermon or lecture is preached there as and for the university sermon or lecture; but the same may be preached or read in such sort and manner, as the same have been heretofore preached or read.

Act of Uniformity, 13 & 14 Car. 2.

13 & 14 Car. 2, c. 4, s. 8; 1 Will. sess. 1, c. 8, s. 11. Every dean, canon and prebendary of every cathedral or collegiate church, and all masters and other heads, fellows, chaplains and tutors of or in any college, hall, house of learning or hospital, and every public professor and reader in either of the universities and in every college elsewhere, and every parson, vicar, curate, lecturer and every other person in holy orders, and every schoolmaster keeping any public or private school, and every person instructing or teaching any youth in any house or private family as a tutor or schoolmaster, who shall be incumbent or have possession of any deanry, canonry, prebend, mastership, headship, fellowship, professor's place or reader's place, parsonage, vicarage or any other ecclesiastical dignity or promotion, or of any curate's place, lecture or school, or shall instruct or teach any youth as tutor or schoolmaster, shall at or before his admission to be incumbent or having possession aforesaid, subscribe the declaration following; "I, A. B., do declare, that I will conform to the liturgy of the Church of England, as it is now by law established."

Subscription and Declaration of Conformity.

13 & 14 Car. 2, c. 4, s. 10. Which said declaration shall be subscribed by every of the said masters and other heads, fellows, chaplains and tutors, of or in any college, hall or house of learning, and by every public professor and reader in either of the universities, before the vice chancellor or his deputy; and by every other of the said persons before the archbishop, bishop or ordinary of the diocese (or his vicar-general, chancellor or commissary (i)): on pain of forfeiting such office,

(i) 15 Car. 2, c. 6. s. 5.

Act of Uni-
formity, 13
& 14 Car. 2.

place, promotion or dignity, and being utterly disabled and *ipso facto* deprived of the same; which shall be void, as if such person failing were naturally dead.

Sect. 11. And if any schoolmaster or other person instructing or teaching youth in any private house or family as a tutor or schoolmaster shall instruct or teach any youth as a tutor or schoolmaster before such subscription, he shall for the first offence suffer three months' imprisonment, and for the second and every other offence shall suffer three months' imprisonment and also forfeit 5*l.* to the king.

And after such subscription made, every such parson, vicar or curate and lecturer shall procure a certificate under the hand and seal of the respective archbishop, bishop or ordinary of the diocese (who shall make and deliver the same upon demand); and shall publicly and openly read the same, together with the said declaration, upon some Lord's day within three months then next following, in his parish church where he is to officiate, in the presence of the congregation there assembled, in the time of divine service: upon pain that every person failing therein (without some lawful impediment to be allowed and approved by the ordinary of the place (*k*), shall lose such place respectively and be disabled and *ipso facto* deprived thereof, and the same shall be void as if he were naturally dead.

[The 12th section relates to the *solemn league*.

[The 13th section enacts, that no incumbent who shall not be in episcopal orders before Bartholomew tide shall be capable of holding benefices.

[The 14th enacts:

["That no person whatsoever shall thenceforth be capable to be admitted to any parsonage, vicarage, benefice or other ecclesiastical promotion or dignity whatsoever, nor shall presume to consecrate and administer the holy sacrament of the Lord's Supper, before such time as he shall be ordained priest according to the form and manner in and by the said book prescribed, *unless he have formerly been made priest by episcopal ordination* (*l*); upon pain to forfeit for every offence the sum of one hundred pounds; one moiety thereof to the king's majesty; the other moiety thereof to be equally divided between the poor of the parish where the offence shall be committed; and such person or persons as shall sue for the same by action of debt, bill, plaint or information, in any of his majesty's courts of record, wherein no essoin, protection or wager of law shall be allowed, and to be disabled from taking or being admitted into the order of priest, by the space of one whole year then next following."—ED.]

Sect. 15. Provided, that the penalties in this act shall not extend to the foreigners or aliens of the foreign reformed

(*k*) 23 Geo. 2, c. 28.

(*l*) [See note to p. 70 of this volume, title *Ordination*.—ED.]

churches, allowed by the king, his heirs and successors in England.

Act of Uniformity, 13
& 14 Car. 2.

Sect. 16. Provided, that no title to confer or present by lapse shall accrue by any avoidance or deprivation *ipso facto* by virtue of this statute, but after six months' notice of such avoidance or deprivation given by the ordinary to the patron, or such sentence of deprivation openly and publicly read in the parish church of the benefice, parsonage or vicarage becoming void, or whereof the incumbent shall be deprived by virtue of this act.

Sect. 17. And no form or order of common prayers, administration of sacraments, rites or ceremonies, shall be openly used in any church, chapel or other public place of or in any college or hall in either of the universities, or of the colleges of Westminster, Winchester or Eton, other than what is prescribed by the said book; and every governor or head of any of the said colleges or halls, shall within one month next after his election or collation and admission into the same government or headship, openly and publicly in the church, chapel or other public place of the same college or hall, and in the presence of the fellows and scholars of the same or the greater part of them then resident, subscribe unto the said book, and declare his unfeigned assent and consent thereunto, and to the use of all the prayers, rites and ceremonies, forms and orders, therein prescribed and contained, according to the form aforesaid: and all such governors or heads of the said colleges and halls as shall be in holy orders, shall once at least in every quarter of the year (not having a lawful impediment) openly and publicly read the morning prayer and service in and by the said book appointed to be read in the church, chapel or other public place of the same college or hall; on pain to lose and be suspended from all the benefits and profits belonging to the same government or headship, by the space of six months, by the visitor or visitors of the same college or hall; and if such governor or head so suspended for not subscribing to the said book, or for not reading of the morning prayer and service as aforesaid, shall not at or before the end of six months next after such suspension subscribe unto the said book and declare his consent thereto as aforesaid, or read the morning prayer and service as aforesaid, then such government or headship shall be *ipso facto* void.

[For ss. 19 to 23, *vide ante*, p. 422; for ss. 26 and 28, p. 421; s. 27 contains provisions relating to the Welsh dioceses, see tit. *Wales*.—ED.]

Sect. 18. Provided, that in the same colleges and halls as aforesaid, the said service as aforesaid may be used in Latin.

Sect. 29. Provided also, that nothing in this act shall be prejudicial to the king's professor of the law within the University of Oxford, for or concerning the prebend of Shipton within

Penalty of
contemning
or not using
the Book of
Common
Prayer.

the cathedral church of Sarum, united and annexed unto the place of the same king's professor for the time being by the late King James of blessed memory.

By Can. 4, "Whosoever shall affirm that the form of God's worship in the Church of England, established by law, and contained in the Book of Common Prayer and Administration of Sacraments, is a corrupt, superstitious, or unlawful worship of God, or containeth any thing in it that is repugnant to the Scriptures, let him be excommunicated *ipso facto*, and not restored but by the bishop of the place, or archbishop, after his repentance and public revocation of such his wicked errors."

By Can. 38, "If any minister after he hath subscribed to the Book of Common Prayer shall omit to use the form of prayer, or any of the orders or ceremonies prescribed in the Communion Book, let him be suspended; and if after a month he do not reform and submit himself, let him be excommunicated; and then if he shall not submit himself within the space of another month, let him be deposed from the ministry."

And by Can. 98, "After any judge ecclesiastical hath pronounced judicially against contemners of ceremonies, for not observing the rites and orders of the Church of England, or for contempt of public prayer, no judge *ad quem* shall allow of his appeal, unless the party appellant do first personally promise and avow, that he will faithfully keep and observe all the rites and ceremonies of the Church of England, as also the prescript form of common prayer, and do likewise subscribe to the same."

By the 13 & 14 Car. 2, c. 4, s. 7, in all places where the proper incumbent of any parsonage or vicarage or benefice with cure doth reside on his living, and keep a curate, the incumbent himself in person (not having some lawful impediment to be allowed by the ordinary of the place) shall once, at the least, in every month openly and publicly read the common prayers and service in and by the said book prescribed, and (if there be occasion) administer each of the sacraments and other rites of the church, in the parish church or chapel belonging to the same, in such order, manner and form as in and by the said book is appointed, on pain of 5*l.* to the use of the poor of the parish for every offence, upon conviction by confession, or oath of two witnesses, before two justices of the peace; and in default of payment within ten days, to be levied by distress and sale by warrant of the said justices, by the churchwardens or overseers of the poor of the said parish (*l*).

By the 2 & 3 Edw. 6, c. 1, and 1 Eliz. c. 2, it is enacted as followeth: "If any parson, vicar, or other whatsoever minister, that ought or should sing or say common prayer mentioned in the said book, or minister the sacraments, refuse to use the said common prayers, or to minister the sacraments in such

(*l*) [See *Newberry v. Godwin*, 1 Phill. 282; and title *Articles*.]

cathedral or parish church, or other places as he should use to minister the same, in such order and form as they be mentioned and set forth in the said book: or shall wilfully or obstinately, standing in the same, use any other rite, ceremony, order, form, or manner of celebrating the Lord's Supper, openly or privily, or mattens, evensong, administration of the sacraments, or other open prayer than is mentioned and set forth in the said book; or shall preach, declare or speak any thing in the derogation or depraving of the said book, or any thing therein contained, or of any part thereof; and shall be thereof lawfully convicted according to the laws of this realm, by verdict of twelve men, or by his own confession, or by the notorious evidence of the fact, he shall forfeit to the king (if the prosecution is on the statute of the 2 & 3 Edw. 6) for his first offence the profit of such one of his spiritual benefices or promotions as it shall please the king to appoint, coming or arising in one whole year after his conviction, and also be imprisoned for six months; and for his second offence be imprisoned for a year, and be deprived *ipso facto* of all his spiritual promotions, and the patron shall present to the same as if he were dead; and for the third offence shall be imprisoned during life; and if he shall not have any spiritual promotion, he shall for the first offence suffer imprisonment six months, and for the second offence imprisonment during life." And if the prosecution is on the statute of the 1 Eliz. c. 2, then he shall "forfeit to the king for the first offence the profit of all his spiritual promotions for one year, and be imprisoned for six months; for the second offence shall be imprisoned for a year, and deprived *ipso facto* of all his spiritual promotions, and the patron shall present as if he were dead; and for the third offence shall be deprived *ipso facto* of all his spiritual promotions, and be imprisoned during life: and if he have no spiritual promotion, he shall for the first offence be imprisoned for a year, and for the second offence during life."

And by the said statutes, "If any person shall in any interludes, plays, songs, rhymes, or by other open words, declare or speak any thing in the derogation, depraving or despising of the same book, or of any thing therein contained, or any part thereof; or shall by open fact, deed, or by open threatenings compel or cause, or otherwise procure or maintain any parson, vicar or other minister in any cathedral or parish church or chapel, or any in any other place, to sing or say any common or open prayer, or to minister any sacrament otherwise, or in any other manner and form than is mentioned in the said book; or by any of the said means shall unlawfully interrupt or let any parson, vicar or other minister, in any cathedral, or parish church, chapel or other place, to sing or say any common and open prayer, or to minister the sacraments or any of them, in such manner and form as is mentioned in the said

Act of Uniformity, 13
& 14 Car. 2.

Act of Uni-
formity, 13
& 14 Car. 2.

book; every such person, being thereof lawfully convicted in form aforesaid, shall (if the prosecution is on the statute of the 2 & 3 Edw. 6) forfeit to the king for the first offence 10*l.*, for the second offence 20*l.*, for the third offence shall forfeit all his goods and be imprisoned during life: and if for the first offence he do not pay the 10*l.* within six weeks after his conviction, he shall instead of the said 10*l.* be imprisoned for three months; and if for the second offence he do not pay the said sum of 20*l.* within six weeks after his conviction, he shall instead of the said 20*l.* be imprisoned for six months." And if the prosecution is on the statute of the 1 Eliz. c. 2, then he shall "forfeit to the king for the first offence 100 marks, for the second offence 400 marks, for the third offence shall forfeit all his goods and be imprisoned during life: and if he do not pay the sum for the first offence within six weeks next after his conviction, he shall instead thereof be imprisoned for six months; and if he do not pay the sum for the second offence within six weeks next after his conviction, he shall instead thereof be imprisoned for twelve months.

"And the justices of assize shall have power to inquire of, hear, and determine all offences contrary to the said acts, and to make process for the execution of the same, as they may do against any person being indicted before them of trespass, or lawfully convicted thereof. Provided, that every archbishop and bishop may at his liberty and pleasure associate himself to the said justices of assize, for the inquiring of, hearing, and determining the same.

"But no person shall be molested for any offence against these acts, unless he be indicted thereof at the next assizes.

"And lords of parliament for the said offences on the 2 & 3 Edw. 6, to be tried by their peers." But if the prosecution is on the 1 Eliz. c. 2, then they shall only "for the third offence be tried by their peers.

"And all mayors, bailiffs, and other head officers of cities, boroughs, or towns corporate, to which justices of assize do not commonly repair, shall have power to inquire of, hear and determine offences against these acts within fifteen days after the Feast of Easter and St. Michael the Archangel yearly, as the justices of assize may do.

"Provided that all archbishops and bishops, and every of their chancellors, commissaries, archdeacons and other ordinaries having any peculiar ecclesiastical jurisdiction, shall have power by virtue of these acts, as well to inquire in their visitations, synods, and elsewhere, within their jurisdiction, at any other time and place, to take accusations and informations of all and every the things above mentioned, done or committed within the limits of their jurisdiction, and to punish the same by admonition, excommunication, sequestration, or depriva-

tion (*m*), and other censures and process, in like form as heretofore hath been used in like cases by the king's ecclesiastical laws. And for their authority in this behalf, all and singular the same archbishops, bishops, and other their officers exercising ecclesiastical jurisdiction as well in places exempt as not exempt within their diocese, shall have full power and authority to reform, correct and punish by censures of the church, all and singular the said offenders within any their jurisdictions or diocese; any other law, statute, privilege, liberty or provision heretofore made, had, or suffered to the contrary notwithstanding. Provided, that whatsoever persons shall for their offences first receive punishment of their ordinary, having a testimonial thereof under the ordinary's seal, shall not for the same offence afterwards be convicted before the justices; and likewise receiving for the said offence punishment first by the justices, shall not for the same offence afterwards receive punishment of the ordinary."

Act of Uniformity, 13
& 14 Car. 2.

If any Parson, Vicar, or other whatsoever Minister.]—Popish priests, as well as others; for in an action hereupon, in the 3 Eliz. brought against a popish priest for saying mass, it was held by the whole court, that he was within the purview of the statute of the 1 Eliz., it appearing clearly by the next clause thereof, that the design of the parliament was, to abolish the superstitious service, and to establish the new service in its place (*n*).

Use any other Rite.]—In the 26 & 27 Eliz. Fleming was indicted upon this statute of the 1 Eliz. and punished; because he had given the sacrament of baptism in other form than is here prescribed (*o*).

E., 1 Jac. 2. An indictment for using *other prayers*, and *in other manner*, seems to have been judged insufficient, because the prayers used may be upon some extraordinary occasion, and so no crime; and it was said, that the indictment ought to have alleged, that the defendant used other forms and prayers *instead* of those enjoined, which were neglected by him; for otherwise every person may be indicted that useth prayers before his sermon, other than such which are required by the Book of Common Prayer (*p*).

Or other open Prayer.]—By the said acts, *open prayer* in and throughout the same, meaneth that prayer which is for others to come unto, or hear either in common churches, or private chapels or oratories, commonly called the service of the church.

Shall forfeit.]—A clerk was indicted hereupon, for using other prayers, and was fined 100 marks; and it was held by the whole court to be ill: because they can inflict no other punishment than what is directed by the statute (*q*).

(*m*) [See title *Visitation*.]

(*n*) Dyer, 203.

(*o*) 1 Leon. 295.

(*p*) 3 Mod. 79.

(*q*) Ibid.

All Archbishops and Bishops.] — If a minister preach against the Book of Common Prayer, this is a good cause of deprivation by the ecclesiastical law without aid of the said statutes: for he that speaketh against the peace and quiet of the church, is not worthy to be a governor of the church. And the statutes being in the affirmative, do not take away the ordinary's power of depriving for the first offence: on the contrary, there is an express proviso, which reserveth to him his power (*r*).

H., 33 Eliz. Robert Caudrey, clerk, was deprived of his benefice before the high commissioners, as well for that he had preached against the Book of Common Prayer, as also for that he refused to celebrate divine service according to the said book; which deprivation, though not prescribed by the statutes for the first offence, was declared to be good; because the ecclesiastical judge might lawfully inflict such sentence before the making of these statutes, and is not inhibited (on the contrary his ancient power is reserved) by the same statutes (*s*).

At Thetford Lent Assizes, 1795, a clerk was indicted upon these statutes; but the evidence was not that he had left out or added any prayers or altered the form of worship, but that he did not read prayers twice on a Sunday, but alternately one Sunday in the morning, and the next in the evening, and omitted to read them at all on certain saint days. The learned judge who tried the indictment, Mr. Baron Perryn, observed that it was *primæ impressionis*, and being of opinion that the offence complained of was purely of ecclesiastical cognizance, and not the subject of prosecution in the temporal courts, directed the jury to acquit the defendant; which they accordingly did.

Penalty of
being present
at any other.

By the 5 & 6 Edw. 6, c. 1, s. 6, "If any person shall willingly and wittingly hear and be present at any other manner or form of common prayer or administration of the sacraments, or of making ministers in the church, or of any other rites contained in the Book of Common Prayer, than is mentioned and set forth in the said book (except persons qualified by the Act of Toleration as before is mentioned, or the 31 Geo. 3, c. 32,) and shall be thereof convicted according to the laws of this realm, before the justices of assize or justices of the peace in their sessions, by the verdict of twelve men, or by confession, or otherwise; he shall for the first offence suffer imprisonment for six months, for the second offence imprisonment for a year, and for the third offence imprisonment during life (*t*)."

(*r*) 2 Rolle's Abr. 222.

(*s*) Gibs. 268; 5 Co., *Caudrey's* case. (*t*) [See *Deprivation*, and the cases referred to, p. 248.]

III. *Orderly Behaviour during the Divine Service.*

Can. 18. "No man shall cover his head in the church or chapel in the time of divine service, except he have some infirmity; in which case let him wear a night-cap, or coif. All manner of persons then present shall reverently kneel upon their knees when the general confession, litany, or other prayers are read; and shall stand up at the saying of the belief, according to the rules in that behalf prescribed in the Book of Common Prayer. And likewise when in time of divine service the Lord Jesus shall be mentioned, due and lowly reverence shall be done by all persons present, as it hath been accustomed; testifying by these outward ceremonies and gestures their inward humility, Christian resolution, and due acknowledgment that the Lord Jesus Christ, the true Eternal Son of God, is the only Saviour of the world, in whom alone all the mercies, graces, and promises of God to mankind for this life and the life to come are fully and wholly comprised. And none, either man, woman, or child, of what calling soever, shall be otherwise at such time busied in the church, than in quiet attendance to hear, mark, and understand that which is read, preached, or ministered; saying in their due places audibly with the minister, the confession, the Lord's Prayer, and the Creed? and making such other answers to the public prayers as are appointed in the Book of Common Prayer: neither shall they disturb the service or sermon, by walking, or talking, or any other way; nor depart out of the church during the time of divine service or sermon, without some urgent or reasonable cause."

By the Canons.

Cover his Head.]—In the 18 Car. 2, an action of trespass for assault and battery was brought against a churchwarden: who pleaded that the plaintiff had his hat on in time of divine service, and that he desired him to put it off, and upon refusal took it off, and delivered it into his hand. And all the court held that the plea was good; except Twisden, who conceived that all that the churchwarden could do, was to present him to the spiritual court; though it is very apparent how necessary an immediate remedy is, in case of this or the like disorders committed in the worship of God. The court also said, that the churchwardens may chastise boys playing in the churchyard, and much more in the church (*u*).

Can. 19. "The churchwardens or questmen and their assistants, shall not suffer any idle persons to abide either in the churchyard or church porch, during the time of divine service, but shall cause them either to come in or to depart."

Can. 85. "The churchwardens or questmen shall take care that in every meeting of the congregation peace be well kept;

(*u*) Gibs. 294; 2 Keb. 124; Sid. Hawk. 139; 1 Mod. 168. See titles 301; [1 Saund. Rep. 14; S. C., 1 *Official and Churchwarden.*]

and that all persons excommunicated, and so denounced, be kept out of the church."

Can. 90. "The churchwardens or questmen shall diligently see that none do walk, or stand idle or talking in the church, or in the churchyard, or the church porch, during the time of divine service."

Can. 111. "In all visitations of bishops and archdeacons, the churchwardens or questmen and sidesmen shall truly and personally present the names of all those which behave themselves rudely or disorderly in the church, or which, by untimely ringing of bells, by walking, talking, or other noise, shall hinder the minister or preacher."

[Churchwardens may and ought to repress all indecent interruptions of the service by others, and desert their duty if they do not. And if a case could be imagined in which even a preacher himself was guilty of any act grossly offensive, either from natural infirmity or disorderly habits, it cannot be said that they or private persons might not interpose to preserve the decorum of public worship. But that is a case of instant and overbearing necessity that supersedes ordinary rules (*x*). See titles *Churchwardens and Vestry*, vol. i. p. 398.—ED.]

By the Statute of the
1 Mar.

By the 1 Mar. sess. 2, c. 3, s. 2, "If any person of his own power and authority shall willingly and of purpose, by open and overt word, fact, act, or deed, maliciously or contemptuously molest, let, disturb, vex or trouble, or by any other unlawful ways or means disquiet or misuse any preacher that shall be licensed, allowed or authorised to preach by the queen's highness, or by any archbishop or bishop of this realm, or by any other lawful ordinary, or by any of the universities of Oxford and Cambridge, or otherwise lawfully authorised or charged by reason of his cure, benefice or other spiritual promotion or charge, in any of his open sermon preaching or collation that he shall make, declare, preach, or pronounce, in any church, chapel, churchyard, or in any other place used, frequented or appointed to be preached in."

Sect. 3. "Or shall maliciously, willingly or of purpose molest, let, disturb, vex, disquiet, or otherwise trouble, any parson, vicar, parish priest or curate, or any lawful priest, preparing, saying, doing, singing, ministering or celebrating the mass, or other such divine service, sacraments or sacramentals, as was most commonly frequented and used in the last year of the reign of King Henry the Eighth, or that at any time hereafter shall be allowed, set forth, or authorised by the queen's majesty."

Sect. 4. "Or shall contemptuously, unlawfully or maliciously, of their own power or authority, pull down, deface, spoil, abuse, break, or otherwise unreverently handle or order the

(*x*) [Lord Stowell, *Hutchins v. Denziloe and Loveland*, 1 Consist. 174.]

most blessed, comfortable, and holy sacrament of the body and blood of our Saviour Jesus Christ, commonly called the sacrament of the altar, that shall be in any church or chapel, or in any other decent place, or the pix or canopy wherein the same sacrament shall be; or unlawfully, contemptuously, or maliciously, of his own power and authority, pull down, deface, spoil or otherwise break any altar, crucifix, or cross, that shall be in any church, chapel, or churchyard: That then every such offender in any the premises, his aiders, procurers, or abettors, immediately and forthwith after the offence committed, shall be apprehended by any constable or churchwarden of the parish, town or place where the offence shall be committed, or by any other officer, or by any other person then being present at the time of the offence committed:"

Sect. 5. "Which person so apprehended shall with convenient speed be carried to a justice of the peace, who shall, upon due accusation by the apprehender or other person of such offence, commit him in safe keeping and custody as by his discretion shall be thought meet; and within six days next after the said accusation made, the said justice, with one other justice, shall diligently examine the offence."

Sect. 6. "And if they shall find him guilty, by two witnesses or by confession, they shall immediately with convenient speed commit him to gaol for three months and further to the next quarter sessions to be holden next after the end of the said three months. At which quarter sessions, the person so committed to gaol, upon his reconciliation and repentance in that behalf, before the said justices at the said sessions, shall be discharged out of prison, upon sufficient surety of his good abearing and behaviour, to be then and there taken by the said justices, for one whole year then next ensuing: And if he will not be reconciled and repent at the said quarter sessions, then he shall immediately in time convenient be further committed to the said gaol by the said justices or the more part of them, there to remain without bail until he shall be reconciled and be penitent for the said offence.

Sect. 7. "And if any person of his own authority and power, willingly and unlawfully do rescue any offender so apprehended, or willingly disturb, hinder, or let such offender to be apprehended, he shall suffer like imprisonment as aforesaid, and further shall forfeit 5*l*.

Sect. 8. "And if any such offender be not apprehended immediately in time convenient as aforesaid, but do escape or go away, then the said escape shall be lawfully presented before the justices of the peace at the next quarter sessions: and the inhabitants of the parish where the escape was so suffered shall forfeit to the queen for every such escape 5*l*.; to be levied as other like amerciaments, upon any village, hundred,

or town, for the escape of a murderer or other felon, for not making hue and cry.

Sect. 9. "And all justices of the peace, justices of assize, mayors, bailiffs and justices of the peace within any city or town corporate, shall have power to inquire of, hear, and determine the said offences, and to set the said fines.

Sect. 10. "Provided, that this shall not in any wise extend to abrogate and take away the authority, jurisdiction, power, and punishment of the ecclesiastical laws now standing and remaining in their force, or for the punishment of any the offences and misdemeanors aforesaid; but the same shall stand in force as if this act had not been made.

Sect. 11. "Provided, that persons for any the said offences receiving punishment of the ordinary, having a testimonial thereof under his seal, shall not for the same eftsoons be convicted before the justices; and in likewise receiving for the said offences punishment by the justices, shall not for the same eftsoons receive punishment of the ordinary."

Or other such Divine Service.—It hath been resolved, that the disturbance of a minister in saying the present common prayer is within this statute; for the express mention of such divine service as should afterwards be authorized by Queen Mary, doth implicitly include such also as should be authorized by her successors; for since the king never dies, a prerogative given generally to one goeth of course to others (*y*).

Shall be apprehended.—In the case of *Glover v. Hind*, M., 25 Car. 2, where an action of trespass of assault and battery was brought, for laying hands on the disturber, it was declared by the court, that at the common law a person disturbing divine service might be removed by any other person there present, as being all concerned in the service of God that was then performing; so that the disturber was a nuisance to them all, and might be removed by the same rule of law that allows a man to abate a nuisance (*z*).

E., 15 Car. 2. The court refused to grant a certiorari to remove an indictment at the sessions against the defendant for not behaving himself reverently and modestly at the church during divine service; because although the offence is punishable by ecclesiastical censures, yet they judged it a proper cause within cognizance of the justices of the peace, and indictable (*a*).

By the Act of
Toleration.

By the 1 Will. 3, c. 18, s. 18, "If any person shall willingly and of purpose, maliciously or contemptuously come into any cathedral or parish church, chapel or other congregation permitted by this act, and disquiet or disturb the same, or misuse any preacher or teacher, he shall on proof thereof before a justice of the peace, by two witnesses, find two sure-

(*y*) 1 Haw. 140.

(*a*) 1 Keb. 491.

(*z*) Gibs. 304; 1 Mod. 168.

ties to be bound by recognizance in the sum of 50*l.* and in default of such sureties shall be committed to prison, there to remain till the next general quarter sessions; and upon conviction of the said offence at such sessions, shall suffer the penalty of 20*l.*"

It has been decided that an indictment upon this act at the quarter sessions may, before verdict, be removed by certiorari into the Court of King's Bench, and upon conviction of several defendants each is liable to the penalty of 20*l.* (*b*).

And a similar penalty is inflicted on those who shall in the same way disturb any congregation or assembly of religious worship, permitted to catholics by the 31 Geo. 3, c. 32, s. 10. By 31 Geo. 3,
c. 32.

By the 1 Geo. 1, st. 2, c. 5, ss. 4, 6, "If any persons unlawfully, riotously and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully and with force demolish or pull down, or begin to demolish or pull down, any church or chapel, or any building for religious worship certified and registered according to the 1 Will. 3, c. 18, the same shall be adjudged felony without benefit of clergy. And the hundred shall answer damages, as in cases of robbery." By the Riot
Act.

IV. *Performance of the Divine Service, in the several Parts thereof.*

The occasional offices are treated of under the title *Holidays*.

Can. 14. "The common prayer shall be said or sung distinctly and reverently, upon such days as are appointed to be kept holy by the Book of Common Prayer, and their eves, and at convenient and usual times of those days, and in such places of every church, as the bishop of the diocese or ecclesiastical ordinary of the place shall think meet for the largeness or straitness of the same, so as the people may be most edified. All ministers likewise shall observe the orders, rites, and ceremonies prescribed in the Book of Common Prayer, as well in reading the Holy Scriptures and saying of prayers, as in administration of the sacraments, without either diminishing in regard of preaching, or in any other respect, or adding any thing in the matter and form thereof." Common
Prayer to be
used on Holi-
days.

[By the 51st section of 59 Geo. 3, c. 99, it is enacted, "That in all cases where the bishop of the diocese shall deem it proper to enforce the performance of morning and evening service on Sundays, or any other service required by law in any parish church or parochial chapel, or the chapel of any extra parochial place, it shall be lawful for such bishop to enforce the Bishops may
enforce Per-
formance of
Morning and
Evening Ser-
vice.

(*b*) *Rex v. Hube and others*, 5 T. Rep. 542. [But see *Martin v. Davis*, Stra. 914.]

same by monition and sequestration, to be issued in the manner by this act provided."

Bishops may enforce Two Services on Sundays in certain Cases.

[Sect. 80 of 1 & 2 Vict. c. 106, enacts, "That it shall be lawful for the bishop, in his discretion, to order that there shall be two full services, each of such services, if the bishop shall so direct, to include a sermon or lecture, on every Sunday throughout the year, or any part thereof, in the church or chapel of every or any benefice within his diocese, whatever may be the annual value or the population thereof; and also in the church or chapel of every parish or chapelry, where a benefice is composed of two or more parishes or chapelries, in which there shall be a church or chapel, if the annual value of the benefice arising from that parish or chapelry shall amount to 150*l.*, and the population of that parish or chapelry shall amount to 400 persons: Provided always, that nothing herein contained shall be taken to repeal or affect the provisions of an act passed in the fifty-eighth year of the reign of his majesty King George the Third, intituled "An Act for building and promoting the building of additional Churches in populous Parishes," by which the bishop of any diocese is empowered to direct the performance of a third or additional service in the several churches or chapels within his diocese under the circumstances therein mentioned."

Not to affect the Provision of the Act 58 Geo. 3, c. 45, s. 65.

No Spiritual Person to serve more than Two Benefices in One Day.

[And by s. 106, "That no spiritual person shall serve more than two benefices in one day unless in case of unforeseen and pressing emergency, in which case the spiritual person who shall so have served more than two benefices shall forthwith report the circumstance to the bishop of the diocese."

[The 2 & 3 Vict. c. 30, enacts, that in benefices where there are more than one spiritual person instituted to the cure of souls, the bishops may apportion the duties; and in case of disobedience to his order, the bishop may proceed as in cases of negligence of spiritual duties of a living subject to an appeal.—ED.]

On other Days.

And by the *preface to the Book of Common Prayer*: "All priests and deacons are to say daily the morning and evening prayer, either privately or openly, not being let by sickness, or some other urgent cause."

And the curate that ministreth in every parish church or chapel, being at home, and not being otherwise reasonably hindered, shall say the same in the parish church or chapel where he ministreth; and shall cause a bell to be tolled thereunto, a convenient time before he begin, that the people may come to hear God's word, and to pray with him.

In what Part of the Church.

By the rubric before the common prayer of the 2 Edw. 6, it was ordered thus: "The priest being in the quire, shall begin with a loud voice the Lord's Prayer, called the Paternoster."

In the Quire.—That is, in his own seat there, as the way was all Edward the Sixth's time; and as is still done in some

churches: but in the beginning of Queen Elizabeth's reign, reading desks began to be set up in the body of the church, and divine service to be read there, by appointment of the ordinaries, according to the power vested in them by the rubric of the 5 & 6 Edw. 6 (*d*).

Shall begin.]—All that now goes before, viz. the sentences, exhortation, confession, and absolution, were first inserted in the second book of Edward the Sixth (*e*).

By the rubric before the present common prayer: "The morning and evening prayer shall be used in the accustomed place of the church, chapel, or chancel; except it shall be otherwise determined by the ordinary of the place."

By Can. 58, "Every minister saying the public prayers, or ministering the sacraments, or other rites of the church, shall wear a decent and comely surplice with sleeves, to be provided at the charge of the parish. And if any question arise touching the matter, decency or comeliness thereof, the same shall be decided by the discretion of the ordinary. Furthermore, such ministers as are graduates shall wear upon their surplices at such times, such hoods as by the orders of the universities are agreeable to their degrees; which no minister shall wear, being no graduate, under pain of suspension; notwithstanding it shall be lawful for such ministers as are not graduates, to wear upon their surplices, instead of hoods, some decent tippet of black, so it be not silk."

Habit of the
Minister officiating.

But this canon (which is somewhat observable) is in part destroyed by the statute law, and by the rubric before the present common prayer.

For by the 1 Eliz. c. 2, s. 25, it is provided, "that such ornaments of the church, and of the ministers thereof, shall be retained and used, as was in this Church of England by authority of parliament in the second year of the reign of King Edward the Sixth; until other order shall be therein taken by the authority of the queen's majesty, with the advice of her commissioners appointed and authorized under the great seal for causes ecclesiastical, or of the metropolitan of this realm." Which other order as to this matter was never taken.

And by the rubric before the common prayer of the 13 & 14 Car. 2, "It is to be noted, that such ornaments of the church, and of the ministers thereof at all times of their ministration, shall be retained and be in use as were in this Church of England by the authority of parliament in the second year of the reign of King Edward the Sixth."

Therefore it is necessary to recur in this matter to the Common Prayer Book established by act of parliament in the second year of King Edward the Sixth: in which there is this

(*d*) Gibs. 297.

(*e*) 2 Burnet, 76.

rubric: "In the saying or singing of *matens* and *evensonge baptizyng* and *burying*, the minister in paryshe churches and chapels annexed to the same, shall use a *surples*. And in all cathedrall churches and colledges the archdeacons, deanes, provestes, maisters, prebendaryes, and fellowes, beinge graduates, may use in the quiere, beside theyr surplusses, such hoodes as pertaineth to their several degrees whiche they have taken in any universitie within this realme. But in all other places every minister shall be at libertie to use any surples or no. It is also seemly that graduates, when they dooe preache, should use suche hoodes as pertayneth to theyr several degrees."

So that in marrying, churching of women, and other offices not here specified, and even in the administration of the holy communion, it seemeth that a surplice is not necessary. And the reason why it is not enjoined for the holy communion in particular, is, because other vestments are appointed for that ministration, which are as followeth: "Upon the day, and at the time appointed for the ministracion of the holy communion, the priest that shall execute the holye ministry, shall put upon hym the vesture appointed for that ministracion, that is to say, a white *albe* plain, with a vestment or *cope*. And where there be many priestes or deacons, there so many shall be ready to helpe the priest in the ministracion, as shall be requisite; and shall have upon them likewyse the vestures appointed for their ministry, that is to say, *albes* with *tunacles*."

Note.—The alb differs from the surplice in being close sleeved.

"And whensoever the byshop shall celebrate the holye communion in the churche, or execute any other publique ministracion; he shall have upon him, besyde his rochette, a surples or albe, and a cope or vestment, and also hys pastoral staffe in hys hand, or elles borne or holden by hys chaplyne."

Morning and
Evening
Prayer.

In the second of Edw. VI., the order for morning and evening prayer began (as was said before) with the Lord's Prayer, and ended with the third collect for grace; the other five prayers that now follow having been added since (*f*).

From which, and from other observations which follow, it will appear, that besides the several offices being now generally put into one, which at first were distinct and separate, they are now become much longer than originally they were, by the additions from time to time which have thereunto been made.

Psalms.

Rubr. The psalter followeth the division of the Hebrews, and the translation of the great English Bible, set forth and used in the time of King Henry VIII. and Edward VI.

Litany.

Can. 15. "The Litany shall be said or sung, when and as is set down in the Book of Common Prayer, by the parsons,

(*f*) Gibs. 300.

vicars, ministers or curates, in all cathedral, collegiate, and parish churches and chapels, in some convenient place, according to the discretion of the bishop of the diocese, or ecclesiastical ordinary of the place; more particularly, upon the Wednesdays and Fridays weekly, though they be not holidays, the minister at the accustomed hours of service shall resort to the church and chapel, and warning being given to the people by tolling of a bell, shall say the Litany prescribed in the Book of Common Prayer: whereunto we wish every householder, dwelling within half a mile of the church, to come or send one at the least of his household fit to join with the minister at prayers."

Of the prayers and thanksgivings which now stand at the end of the litany service, the first two prayers (for rain and fair weather) were at the end of the communion service in the book of the 2 Edw. VI. To which were added in the 5 Edw. VI. these prayers. In the time of dearth and famine; in the time of war; and in the time of plague and sickness. The prayer to be used after any other, and the thanksgivings for rain, fair weather, plenty, and deliverance from enemies, were brought in by King James I. The prayers, in the Ember weeks, for the parliament, and for all conditions of men, were added in 1661; as were also the general thanksgiving, and the thanksgiving for public peace, and for deliverance from the plague (*g*).

Prayers and
Thanksgiv-
ings after the
Litany.

By the several acts of uniformity, the form of worship directed in the Book of Common Prayer shall be used in the church, and no other; but with this proviso, that it shall be lawful for all men, as well in churches, chapels, oratories, or other places, to use openly any psalms or prayer taken out of the Bible, at any due time, not letting or omitting thereby the service, or any part thereof, mentioned in the said book (*h*).

"And whereas heretofore there hath been great diversity in saying and singing in churches within this realm, some following Salisbury use, some Hereford use, and some the use of Bangor, some of York, some of Lincoln; now from henceforth all the whole realm shall have but one use (*i*)."

Salisbury Use.]—Lindwood, speaking of the use of Sarum, says, that almost the whole province of Canterbury followeth this use; and adds as one reason of it, that the Bishop of Sarum is precentor in the college of bishops, and at those times when the Archbishop of Canterbury solemnly performeth divine service in the presence of the college of bishops, he ought to govern the quire, by usage and ancient custom (*k*).

Some Hereford Use.]—In the northern parts was generally observed the use of the archiepiscopal church of York; in South Wales, the use of Hereford; in North Wales, the use of

(*g*) Gibs. 301.

(*h*) 2 & 3 Edw. 6, c. 1, s. 7.

(*i*) Pref. to the Com. Pr.

(*k*) Gibs. 259.

Bangor; and in other places, the use of other of the principal sees, as particularly that of Lincoln (*l*).

ChurchMusic.

The rule laid down for church music in England almost one thousand years ago, was, that they should observe a plain and devout melody, according to the custom of the church. And the rule prescribed by Queen Elizabeth in her injunctions was, that there should be a modest and distinct song, so used in all parts of the common prayers in the church, that the same may be as plainly understood as if it were read without singing. Of the want of which grave, serious and intelligible way, the *Reformatio Legum* had complained before. And whether some regulations may not now be necessary, to render church music truly useful to the ends of devotion, and to guard against indecent levities, seemeth to require some consideration (*m*).

[In *Hutchins v. Denziloe* (*n*), Lord Stowell said the bishop might exercise a discretion as to ordering the psalms to be sung in parish churches as well as in cathedrals; and he gives the following beautiful sketch of the history of church music in this country:—

["In the primitive churches, the favourite practice of the Christians to sing hymns in *alternate verses*, is expressly mentioned by Pliny, in one of his epistles to the Emperor Trajan. The Church of Rome afterwards refined upon this practice;—as it was their policy to make their ministers considerable in the eyes of the common people; and one way of effecting *that*, was by appointing them sole officers in the public service of the church; and difficult music was introduced, which no one could execute without a regular education of that species. At the Reformation this was one of the grievances complained of by the laity; and it became the distinguishing mark of the reformers to use plain music, in opposition to the complex musical service of the catholics. The Lutheran Church, to which the Church of England has more conformed in discipline, retained a choral service. The Calvinistic Churches, of which it has sometimes been harshly said, 'that they think to find religion wherever they do not find the Church of Rome,' have discarded it entirely, with a strong attachment to plain congregational melody,—and that perhaps not always of the most harmonious kind.

["The reformation of the Church of England, which was conducted by authority, as all reformations should be, if possible, and not merely by popular impulse, retained the choral service in cathedrals and collegiate chapels. There are certainly, in modern usage, two services to be distinguished; one the cathedral service, which is performed by persons who are in a certain degree professors of music, in which others can join only by ear; the other, in which the service is performed

(*l*) Ayl. Par. 356.

(*m*) Gibs. 298, 299.

(*n*) [1 Consist. R. 175.]

in a plain way, and in which all the congregation nearly take an equal part. It has been argued, that nothing beyond this ought to be permitted in ordinary parochial service; it being *that* which general usage at the present day alone permits. But that carries the distinction further than the law will support—for, if inquiries go further back, to periods more nearly approaching the Reformation, there will be found authority sufficient, in point of law and practice, to support the use of more music even in a parish church or chapel.

[“The first Liturgy was established in the time of Edw. VI. in 1548. This was followed, after a lapse of four years, by a second, which was published in the reign of the same king, in 1552; and the third, which is in use at present, agreeing in substance with the former, as ordained and promulged 1 Eliz. in 1559.

[“It is observable that these statutes of Edw. VI., which continue in force, describe even-service as even-song. This is adopted into the statute of the first of Elizabeth. The Liturgy also of Edw. VI. describes *the singing or saying of even-song*; and in the communion service, the minister is directed *to sing* one or more of the sentences at the offertory. The same with regard to the Litany;—*that* is appointed to be *sung*. In the present Liturgy, the Psalter is printed with directions that it should *be said or sung*, without any distinction of parish churches, or others; and the rubric also describes the Apostles Creed ‘*to be sung or said by the minister and people*,’ not by the prebendaries, canons, and a band of regular choristers, as in cathedrals; but plainly referring to the service of a parish church. Again, in the burial service:—part is *to be sung by the minister and people*; so also in the Athanasian and Nicene Creeds.

[“The injunctions, that were published in 1559 by Queen Elizabeth, completely sanction ‘the continuance of singing in the church,’ distinguishing between the music adapted for cathedral and collegiate churches, and parochial churches; also in the articles, for the administration of prayer and sacraments set forth, in the further injunctions of the same queen, in 1564, the common prayer is directed ‘to be *said or sung* decently and distinctly, in such place as the ordinary shall think meet, for the largeness and straitness of the church and choir, so that the people may be most edified.’ If, then, chanting was unlawful any where but in cathedrals and colleges, these canons are strangely worded, and are of disputable meaning. But in order to show they are not liable to such imputation, I shall justify my interpretation of them by a quotation from the ‘*Reformatio Legum*,’—a work of great authority in determining the *practice* of those times, whatever may be its correctness in matter of law. With respect to parish churches *in cities*, it is there observed, ‘*eadem parochiarum in urbibus constitutarum*

erit omnis ratio, festis et dominicis diebus, quæ prius collegiis et cathedralibus ecclesiis (ut vocant) attributa fuit. The metrical version of the Psalms was then not existing, the first publication not taking place till 1562, and it was not regularly annexed to the Book of Common Prayer till 1576, after which those psalms soon became the great favourites of the common people. The introduction of this version made the ancient hymns disrelished; but it cannot be meant that they were entirely superseded; for, under the statutes of the Reformation, and the usage explanatory of them, it is recommended that the ancient hymns should be used in the Liturgy, or rather that they should be preferred to any others; though certainly to perform them by a select band with complex music, very inartificially applied, as in many of the churches in the country, is a practice not more reconcilable to good taste than to edification. But to sing with plain congregational music is a practice fully authorized, particularly with respect to the concluding part of different portions of the service."—ED.]

Publication
of Ecclesiastical
Matters
in the Church.

By the statute of 26 Geo. 2, c. 33, after the second lesson shall the banns of matrimony be published.

And by the Rubric. After the Nicene Creed is ended, the curate shall declare unto the people what holidays or fasting days are in the week following to be observed; and then also, if occasion be, shall notice be given of the communion; and briefs, citations, and excommunications read; and nothing shall be proclaimed or published in the church, during the time of divine service, but by the minister; nor by him any thing, but what is prescribed in the rules of this book, or enjoined by the king, or by the ordinary of the place.

Public
Preaching.

The clergy in Queen Elizabeth's time being very ignorant (and no wonder, their stipends in most places being exceeding small), and moreover the state having a jealous eye upon them, as if they were not very well affected to the Reformation, none were permitted to preach without licence, but they were to study and read the homilies gravely and aptly; and they that were instituted subscribed a promise to the same effect. And this continued in some measure in the next reign; for ministers not licensed to preach were by the canons prohibited to expound any text of Scripture, and were only to read the homilies even in their own cures. But the occasion of those canons being now taken away, the bishops do generally and justly forbear to put the canons as to this matter in execution; and every priest is permitted to preach, at least in his own cure, as he may and ought to do by the old canon law, and by the charge given him at his ordination, and by the very nature of his office (o).

The restraints in this kind were (and are) as follows:—

Arundel. "No priest not being licensed shall exercise the

(o) Johns. 48.

office of preaching, until he shall be examined and sent by the bishop, and shall produce the authority by which he preacheth (*p*).” Public
Preaching.

Form of ordaining Deacons.]—“Take thou authority to read the gospel in the church of God, and to preach the same, if thou be thereto licensed by the bishop himself.”

Form of ordaining Priests.]—“Take thou authority to preach the word of God, and to minister the holy sacraments, in the congregation where thou shalt be lawfully appointed thereunto.

Art. 23. “It is not lawful for any man to take upon him the office of public preaching, or ministering the sacraments in the congregation, before he be lawfully called and sent to execute the same. And those we ought to judge lawfully called and sent, which be chosen and called to this work by men who have public authority given unto them in the congregation, to call and send ministers into the Lord’s vineyard.”

Can. 36. “No person shall be received into the ministry, nor admitted to any ecclesiastical living, nor suffered to preach, to catechize, or to be a lecturer or reader of divinity in either university, or in any cathedral or collegiate church, city, or market town, parish church, chapel, or any other place within this realm; except he be licensed either by the archbishop or by the bishop of the diocese where he is to be placed, under their hands and seals, or by one of the two universities under their seal likewise; and except he shall first subscribe to the three articles concerning the King’s Supremacy, the Book of Common Prayer, and the Thirty-nine Articles; and if any bishop shall license any person without such subscription, he shall be suspended from giving licences to preach for the space of twelve months.”

And by the 31 Eliz. c. 6, s. 10, “If any person shall receive or take any money, fee, reward, or any other profit, directly or indirectly, or any promise thereof, either to himself or to any of his friends (all ordinary and lawful fees only excepted), to procure any licence to preach, he shall forfeit 40*l*.”

After the preacher shall be licensed, then it is ordained as followeth:—

Can. 45. “Every beneficed man, allowed to be a preacher, and residing on his benefice, having no lawful impediment, shall in his own cure, or in some other church or chapel (where he may conveniently) near adjoining, where no preacher is, preach one sermon every Sunday of the year; wherein he shall soberly and sincerely divide the word of truth, to the glory of God, and to the best edification of the people.”

Can. 47. “Every beneficed man, licensed by the laws of this realm (upon urgent occasions of other service) not to reside upon his benefice, shall cause his cure to be supplied by a curate

(*p*) Lind. 288.

that is a sufficient and licensed preacher, if the worth of the benefice will bear it. But whosoever hath two benefices, shall maintain a preacher licensed, in the benefice where he doth not reside, except he preach himself at both of them usually."

By Can. 50, "Neither the minister, churchwardens, nor any other officers of the church, shall suffer any man to preach within their churches or chapels, but such as by showing their licence to preach shall appear unto them to be sufficiently authorised thereunto, as is aforesaid."

Can. 51. "The deans, presidents, and residentiaries of any cathedral or collegiate church, shall suffer no stranger to preach unto the people in their churches, except they be allowed by the archbishop of the province, or by the bishop of the same diocese, or by either of the universities; and if any in his sermon shall publish any doctrine either strange or disagreeing from the Word of God, or from any of the Thirty-nine Articles, or from the Book of Common Prayer, the dean or residents shall by their letters, subscribed with some of their hands that heard him, so soon as may be, give notice of the same to the bishop of the diocese, that he may determine the matter, and take such order therein as he shall think convenient."

Can. 52. "That the bishop may understand (if occasion so require) what sermons are made in every church of his diocese, and who presume to preach without licence, the churchwardens and sidesmen shall see that the names of all preachers which come to their church from any other place be noted in a book, which they shall have ready for that purpose, wherein every preacher shall subscribe his name, the day when he preached, and the name of the bishop of whom he had licence to preach."

Can. 53. "If any preacher shall in the pulpit particularly or namely of purpose impugn or confute any doctrine delivered by any other preacher in the same church, or in any church near adjoining, before he hath acquainted the bishop of the diocese therewith, and received order from him what to do in that case, because upon such public dissenting and contradicting there may grow much offence and disquietness unto the people, the churchwardens or party grieved shall forthwith signify the same to the said bishop, and not suffer the said preacher any more to occupy that place which he hath once abused, except he faithfully promise to forbear all such matter of contention in the church, until the bishop hath taken further order therein: who shall with all convenient speed so proceed therein, that public satisfaction may be made in the congregation where the offence was given. Provided, that if either of the parties offending do appeal, he shall not be suffered to preach *pendente lite*."

Can. 55. "Before all sermons, lectures, and homilies, the preachers and ministers shall move the people, to join with them in prayer, in this form, or to this effect, as briefly as con-

veniently they may; ‘Ye shall pray for Christ’s holy Catholic Church, that is, for the whole congregation of Christian people dispersed throughout the whole world, and especially for the churches of England, Scotland, and Ireland. And herein I require you most especially, to pray for the king’s most excellent majesty, our sovereign lord James, King of England, Scotland, France, and Ireland, Defender of the Faith, and supreme governor in these his realms, and all other his dominions and countries, over all persons, in all causes, as well ecclesiastical as temporal. Ye shall also pray for our gracious Queen Anne, the noble Prince Henry, and the rest of the king and queen’s royal issue. Ye shall also pray for the ministers of God’s holy word and sacraments, as well archbishops and bishops, as other pastors and curates. Ye shall also pray for the king’s most honourable council, and for all the nobility and magistrates of this realm, that all and every of these in their several callings may serve truly and painfully to the glory of God, and the edifying and well governing of his people, remembering the account that they must make. Also ye shall pray for the whole commons of this realm, that they may live in the true faith and fear of God, in humble obedience to the king, and brotherly charity one to another. Finally, let us praise God for all those which are departed out of this life in the faith of Christ, and pray unto God that we may have grace to direct our lives after their good example; that this life ended, we may be made partakers with them of the glorious resurrection in the life everlasting: always concluding with the Lord’s Prayer.’”

The like form was enjoined by the injunctions of Queen Elizabeth in the year 1559; and a form of bidding was likewise prescribed (but of a different tenor from these two) by the injunctions of Edw. VI.; and also before this (and before the Reformation) we find the like bidding form in English, in a *festival* printed in the year 1509, which is much longer than these, and is reprinted at length by Dr. Burnet in his History of the Reformation (*q*).

The occasion of this kind of bidding prayer (as it is called) was that in the ancient church silence was commanded to be kept for a time, for the people’s secret prayers; and in this or such like form the minister directed the people what to pray for. A remainder of which usage is still preserved in the office of ordination of priests (*r*).

In the year 1661 there is an entry in the journal of the upper house of convocation, that the bishops unanimously voted for one form of prayer to be used by all ministers, as well before as after sermon; and that this order was pursued in the convocation (although not brought to effect), appears from the

(*q*) Vol. ii. Appendix, p. 104.

(*r*) 1 Warn. 28.

minutes of the lower house, where on January 31st we find a committee appointed for this (among other purposes), to compile a prayer before sermon(s).

What the
Priest shall
explain.

Peccham. "Every priest shall explain to the people four times a year, the fourteen articles of faith, the Ten Commandments, the two evangelical precepts, the seven works of mercy, the seven deadly sins, with their consequences, the seven principal virtues, and the seven sacraments of grace. The fourteen articles of faith (whereof seven belong to the mystery of the Trinity, and seven to Christ's humanity), are 1. The unity of the divine essence in the three persons of the undivided Trinity. 2. That the Father is God. 3. That the Son is God. 4. That the Holy Ghost, proceeding from the Father and the Son, is God. 5. The creation of heaven and earth by the whole and undivided Trinity. 6. The sanctification of the church by the Holy Ghost, the sacraments of grace, and all other things wherein the Christian Church communicateth. 7. The consummation of the church in eternal glory, to be truly raised again in flesh and spirit, and opposite thereunto the eternal damnation of the reprobate. 8. The incarnation of Christ. 9. His being born of the Blessed Virgin. 10. His suffering and death upon the cross. 11. His descent into hell. 12. His resurrection from the dead. 13. His ascension into heaven. 14. His future coming to judge the world. The Ten Commandments are the precepts of the Old Testament. To these the gospel addeth two others, to wit, the love of God and of our neighbour. Of the seven works of mercy, six are collected out of the gospel of St. Matthew; to feed the hungry, to give drink to the thirsty, to entertain the stranger, to clothe the naked, to visit the sick, and to comfort those that are in prison; and the seventh is gathered out of Tobias, to wit, to bury the dead. The seven deadly sins are pride, envy, anger, or hatred, slothfulness, covetousness, gluttony and drunkenness, luxury. The seven principal virtues are faith, hope and charity, which respect God; prudence, temperance, justice, fortitude, with regard unto men. The seven sacraments of grace are baptism, confirmation, orders, penance, matrimony, the eucharist and extreme unction (*t*). [See title **Sacrament**.]

Homilies.

Rubric after the Nicene Creed.—Then shall follow the sermon, or one of the homilies already set forth or hereafter to be set forth by authority.

Form of ordaining Deacons.—It appertaineth to the office of a deacon to read holy scriptures and homilies in the church.

Art. 35. "The second book of homilies, the several titles whereof we have joined unto this article, doth contain a godly and wholesome doctrine, and necessary for these times, as doth the former book of homilies, which were set forth in the time of Edward the Sixth; and therefore we judge them to be read

(s) Gibs. 311.

(t) Lind. 1, 43, 54.

in churches by the ministers diligently and distinctly, that they may be understood of the people."

Canon 49. "No person whatsoever, not examined and approved by the bishop of the diocese, or not licensed as is aforesaid for a sufficient or convenient preacher, shall take upon him to expound in his own cure or elsewhere any scripture or matter of doctrine; but shall study to read plainly and aptly (without glossing or adding) the homilies already set forth, or hereafter to be published by lawful authority, for the confirmation of the true faith, and for the good instruction and edification of the people."

Canon 46. "Every beneficed man, not allowed to be a preacher, shall procure sermons to be preached in his cure once in every month at the least, by preachers lawfully licensed, if his living, in the judgment of the ordinary, will be able to bear it. And upon every Sunday, when there shall not be a sermon preached in his cure, he or his curate shall read some one of the homilies prescribed or to be prescribed by authority, to the intents aforesaid.

—♦—

[V. *The Act 7 Will. 4 & 1 Vict. c. 45, as to Notices in Church.*

Divers acts of parliament, and other matters temporal, were required to be published in the churches. Such are these which follow :

Publication
of Acts of
Parliament,
and other
Temporal
Matters in
the Church.

The act of uniformity of the 5 & 6 Edw. 6, is required to be read in the church by the minister once every year.

The act against swearing, of the 19 Geo. 2, to be read in the church by the minister four times every year.

The act of the 12 Anne, st. 2, c. 18, concerning ships in distress, to be read in the church four times a year in all the sea-port towns and on the coast, immediately after prayers and before the sermon.

The act for the observation of the 5th of November, to be read by the minister on that day, after the morning prayer or preaching.

The act for the commemoration of King Charles the Second's restoration, to be read after the Nicene Creed on the Lord's day next before the 29th day of May yearly, and the 58 Geo. 3, c. 69 (*u*), for giving notice of vestries.

[But by an act passed 12th July, 1837, "To alter the Mode of giving Notices for the holding of Vestries and of making Proclamations in Cases of Outlawry, and of giving Notices on Sundays with respect to various Matters," it was provided,

7 Will. 4 and
1 Vict. c. 45.

["WHEREAS by an act of parliament passed in the fifty-eighth year of the reign of his majesty King George the Third, intituled, 'An Act for the Regulation of Parish Vestries,' it is enacted, that no vestry or meeting of the inhabitants in vestry of or for any pa-

58 G. 3, c. 69.

(*u*) [See 58 Geo. 3, c. 69, under title *Vestry*, in *Churchwardens*.]

7 Will. 4 and
1 Vict. c. 45.

So much of
the first re-
cited Act as
directs Pub-
lication of
Notices re-
pealed.

Notices not
to be given
in Churches
during Di-
vine Service,
&c.

Notices here-
tofore usually
given during
or after Di-
vine Service,
&c. to be
affixed to the
Church
Doors.

Notices for
holding Ves-
tries to be
signed as
herein di-
rected.

Decrees, &c.
not to be
read in
Churches.

rish shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days at the least before the day to be appointed for holding such vestry, by the publication of such notice in the parish church or chapel on some Sunday during or immediately after divine service, and by affixing the same, fairly written or printed, on the principal door of such church or chapel: And whereas by an act passed in the thirty-first year of Queen Elizabeth it is enacted, that before any outlawry shall be had and pronounced proclamation shall be made at the door of the church or chapel of the town or parish where the defendant shall be dwelling immediately after divine service on a Sunday: And whereas by divers acts relative to the assessing and collecting of highway and poor rates and land tax, and other matters, it is directed or required that public notice shall be given with reference to certain proceedings relating thereto respectively in the parish churches or chapels during divine service: And whereas by ancient custom notice is usually given in churches during divine service of the times appointed for holding courts leet, courts baron, and customary courts: And whereas it is expedient that such mode of giving notices should be altered: Be it enacted, that from and after the passing of this act so much of the said first recited act as directs the publication of such notices to be made in the parish church or chapel on some Sunday during or immediately after divine service shall be and the same is hereby repealed; and that from and after the first day of January next no proclamation or other public notice for a vestry meeting or any other matter shall be made or given in any church or chapel during or after divine service, or at the door of any church or chapel at the conclusion of divine service."

[Sect. 2. "That from and after the first day of January next all proclamations or notices which under or by virtue of any law or statute, or by custom or otherwise, have been heretofore made or given in churches or chapels during or after divine service, shall be reduced into writing, and copies thereof either in writing or in print, or partly in writing and partly in print, shall previously to the commencement of divine service on the several days on which such proclamations or notices have heretofore been made or given in the church or chapel of any parish or place, or at the door of any church or chapel, be affixed on or near to the doors of all the churches and chapels within such parish or place; and such notices when so affixed shall be in lieu of and as a substitution for the several proclamations and notices so heretofore given as aforesaid, and shall be good, valid, and effectual to all intents and purposes whatsoever."

[Sect. 3. "That no such notice of holding a vestry shall be affixed on the principal door of such church or chapel unless the same shall previously have been signed by a churchwarden of the church or chapel, or by the rector, vicar, or curate of such parish, or by an overseer of the poor of such parish; but that every such notice so signed shall be affixed on or near to the principal door of such church or chapel."

[Sect. 4. "That from and after the first day of January next no decree relating to a faculty, nor any other decree, citation, or proceeding whatsoever in any ecclesiastical court, shall be read or

published in any church or chapel during or immediately after divine service." 7 Will. 4 and
1 Vict. c. 45.

[Sect. 5. "That nothing in this act shall extend or be construed to extend to the publication of banns, nor to notice of the celebration of divine service or of sermons, nor to restrain the curate, in pursuance of the rules in the Book of Common Prayer, from declaring unto the people what holy days or fasting days are in the week following to be observed, nor to restrain the minister from proclaiming or publishing what is prescribed by the rules of the Book of Common Prayer, or enjoined by the queen or by the ordinary of the place." Act not to
extend to
Notices
purely Eccle-
siastical.

[Sect. 6. "That all the provisions of this act shall extend and be construed to extend to the town of Berwick-upon-Tweed, the Isle of Man, and the islands of Guernsey, Jersey, Alderney, and Sark." Extension of
Act.
—ED.]

Pulpit—See Church.

Purgation.

BY a provincial constitution of Archbishop Langton, ecclesiastical judges shall not compel any to come to purgation at the suggestion of their apparitors, unless they be infamed by grave and good men (v). Purgation in
general.

And by a constitution of Archbishop Stratford, persons defamed of crimes and excesses, and willing to purge themselves, shall not be drawn out of one deanery into another, or to places in the country where victuals and necessaries of life are not to be sold; and in the enjoining of purgation to them, not more than six compurgators shall be required for fornication or the like crime; nor more than twelve for a greater crime, as for adultery (x).

And purgation was exercised in the following manner: When any man or woman lay under a common suspicion or public fame of incontinence or other vice, though there was not proof plain and full enough to convict them, yet were they liable to be summoned before the spiritual judge, and to be charged with the crime. If they confessed, they had a certain penance immediately enjoined them: if they denied, the judge enjoined them purgation to be performed on a day appointed, by their own oath, and by the oaths of five or six neighbours (more or less, according to the nature of the crime, and the condition of the person), and those to be of good fame and sober conversation. The oath of the person suspected was to declare his own innocence; and the oath of the compurgators, that they believed what he swore was true. If the person

(v) Lind. 312.

(x) Lind. 313.

came at the day appointed, together with his neighbours, and purged himself according to the rules of the church, he was dismissed, and declared innocent, and restored to his good name; but he was at the same time enjoined to avoid the cause of suspicion or the ground of the fame, for the time to come. But if he appeared not, he was declared contumacious, and proceeded against as such; or if he did appear, and could not perform purgation (that is, either would not swear to his own innocence, or could not bring others to swear that they believed he swore true), such failure was taken for conviction, and the judge proceeded to enjoin penance in the same manner as if the person had been duly convicted, by his own confession, or by the testimony of others (*y*).

But by the 13 Car. 2, c. 12, s. 4, "It shall not be lawful for any person exercising ecclesiastical jurisdiction, to tender or administer unto any person whatsoever the oath usually called the oath *ex officio*, or any other oath, whereby such person to whom the same is tendered or administered, may be charged or compelled to confess or accuse, or to purge him or herself of any criminal matter or thing whereby he or she may be liable to censure or punishment.

Purgation on
the Benefit of
Clergy al-
lowed.

2. Anciently, upon the allowance of the benefit of clergy, the person accused was delivered to the ordinary to make his purgation, which was to be before a jury of twelve clerks, by his own oath affirming his innocency, and the oaths of twelve compurgators as to their belief of it (*z*).

But now, by the statute of the 18 Eliz. c. 7, this kind of purgation is also taken away; and the person admitted to his clergy shall not be delivered to the ordinary (*a*). [See titles Defamation, Excommunication, Practice.]

Quakers—See **Dissenters**, [Oaths, and Register—**Non-Parochial**.]

Quare Impedit.

QUARE IMPEDIT is a writ that lieth where one hath an advowson, and the parson dies, and another presents a clerk, or disturbs the rightful patron to present, then the rightful patron (although he be a purchaser, and do not claim from his ancestors) shall have this writ. But an assize of

(*y*) Gibs. 1042.

(*z*) 2 H. H. 383; Wood's Civ. L. 669.

(*a*) On the subject of purgation,

see Hob. Rep. 290; and 4 Bla. Com. 368 [see also 73rd case in the Third Century of Eight Centenaries of Reports, by Jenkins, ed. 1734.—ED.]

darrein presentment lies, where a man or his ancestors have presented before. From whence it follows, that where a man may have an assize of *darrein presentment*, he may have a *quare impedit*, but not contrariwise (*b*).

And it is so called, in like manner as most of the other writs in the register, from certain words in the writ respecting the special matter for which the writ is brought.

The law concerning writs of *quare impedit* is treated of under the title *Advowson*.

Quare incumbavit.

QUARE INCUMBRAVIT is a writ that lies, where two are in plea for the advowson of a church, and the bishop admits the clerk of one of them within the six months; then the other shall have this writ against the bishop. And this writ lies always depending the plea (*c*).

Which is treated of more at large under title *Advowson*.

Quare non admisit.

QUARE NON ADMISIT is a writ that lies where a man hath recovered an advowson, and sends his clerk to the bishop to be admitted, and the bishop will not receive him, then he shall have the said writ against the bishop (*d*).

Quarrelling in the Church or Churchyard—See **Church.**

[**Queen Anne's Bounty**—See **First Fruits and Tenths.**]

Querela Duplex—See **Double Quarrel.**

Questmen—See **Churchwardens.**

Quod permittat.

QUOD PERMITTAT is a writ granted to the successor of a parson for the recovery of common of pasture, by the statute of the 13 Edw. 1, c. 24, and hath its name from those words in the writ.

(*b*) Terms of the Law.

(*c*) Ibid.

(*d*) Ibid.

Rate for the repair of the Church—See **Church**.

Reader.

THE office of reader is one of the five inferior orders in the Romish Church.

And in this kingdom, in churches or chapels where there is only a very small endowment, and no clergyman will take upon him the charge or cure thereof; it hath been usual to admit readers, to the end that divine service in such places might not altogether be neglected.

It is said, that readers were first appointed in the Church about the third century. In the Greek Church they were said to have been ordained by the imposition of hands: But whether this was the practice of all the Greek churches hath been much questioned. In the Latin Church it was certainly otherwise. The council of Carthage speaks of no other ceremony, but the bishop's putting the Bible into his hands in the presence of the people, with these words, "Take this book and be thou a reader of the word of God, which office if thou shalt faithfully and profitably perform, thou shalt have part with those that minister in the word of God." And in Cyprian's time, they seem not to have had so much of the ceremony as delivering the Bible to them, but were made readers by the bishop's commission and deputation only, to such a station in the Church (*a*).

Upon the reformation here, they were required to subscribe to the following injunctions:

"Imprimis, I shall not preach or interpret, but only read that which is appointed by public authority:

"I shall not minister the sacraments or other public rites of the church, but bury the dead, and purify women after their childbirth:

"I shall keep the register book according to the injunctions:

"I shall use sobriety in apparel, and especially in the church at common prayer:

"I shall move men to quiet and concord, and not give them cause of offence:

"I shall bring in to my ordinary testimony of my behaviour, from the honest of the parish where I dwell, within one half year next following:

"I shall give place upon convenient warning so thought by the ordinary, if any learned minister shall be placed there at the suit of the patron of the parish:

(*a*) Bing. Antiq. vol. ii. p. 31.

"I shall claim no more of the fruits sequestered of such cure where I shall serve, but as it shall be thought meet to the wisdom of the ordinary:

"I shall daily at the least read one chapter of the Old Testament, and one other of the New, with good advisement, to the increase of my knowledge:

"I shall not appoint in my room, by reason of my absence or sickness, any other man; but shall leave it to the suit of the parish to the ordinary, for assigning some other able man:

"I shall not read but in poorer parishes destitute of incumbents, except in the time of sickness, or for other good considerations to be allowed by the ordinary:

"I shall not openly intermeddle with any artificers' occupations, as covetously to seek a gain thereby; having in ecclesiastical living the sum of twenty nobles or above by the year."

This was resolved to be put to all readers and deacons by the respective bishops, and is signed by both the archbishops, together with the Bishops of London, Winchester, Ely, Sarum, Carlisle, Chester, Exeter, Bath and Wells, and Gloucester (*b*).

By the foundation of divers hospitals, there are to be readers of prayers there, who are usually licensed by the bishop.

The rector of St. Ann's, by certificate to the bishop, appointed Martyn curate of his parish, with a salary of fifty guineas, until he should be otherwise provided of some *ecclesiastical preferment*. Martyn was afterwards appointed to the readership of the parish, for which he had 30*l.* by order and at the will of the vestry. It was the opinion of Lord Mansfield and the Court of King's Bench, that this readership was not an ecclesiastical preferment with the meaning of the certificate (*c*).

By the 13 & 14 Car. 2, c. 4, s. 8, *readers in the universities* are required to sign the declaration contained in sect. 9, which is still in force so far as respects the liturgy (*d*).

Reading Desk—See **Church**.

Refusal—See **Benefice**.

Register or Registrar.

1. **BY** can. 123, "No chancellor, commissary, archdeacon, official, or any other person using ecclesiastical jurisdiction," His presence necessary to a Judicial Act.

(*b*) Strype's Annals, vol. i. p. 306.

(*d*) [See title **Colleges and Universities**, vol. i.]

(*c*) *Martyn v. Hind*, Cowp. 437.

[See titles **Curate** and **Lecturer**.]

shall speed any judicial act, either of contentious or voluntary jurisdiction, except he have the ordinary register of that court, or his lawful deputy; or if he or they will not or cannot be present, then such persons as by law are allowed in that behalf to write or speed the same, under pain of suspension *ipso facto*."

And this is according to the rule of the ancient canon law; which, to prevent falsifications, requireth the acts to be written by some public person, (if he may be had,) or else by two other credible persons: and the credit which the canon law gives to a notary public is, that his testimony shall be equal to that of two witnesses (e).

When he
may be sus-
pended.

2. By can. 134, "If any register, or his deputy or substitute whatsoever shall receive any certificate without the knowledge and consent of the judge of the court; or willingly omit to cause any person (cited to appear upon any court day) to be called; or unduly put off and defer the examination of witnesses to be examined by a day set and assigned by the judge; or do not obey and observe the judicial and lawful monition of the said judge; or omit to write or cause to be written such citations and decrees as are to be put in execution and set forth before the next court day; or shall not cause all testaments exhibited into his office to be registered within a convenient time; or shall sit down or enact, as decreed by the judge, any thing false or conceited by himself, not so ordered or decreed by the judge; or in the transmission of processes to the judge *ad quem*, shall add or insert any falsehood or untruth, or omit any thing therein, either by cunning or by gross negligence; or in causes of instance, or promoted of office, shall receive any reward in favour of either party, or be of council directly or indirectly with either of the parties in suit; or in the execution of their office shall do ought else maliciously, or fraudulently, whereby the said ecclesiastical judge or his proceedings may be slandered or defamed: we will and ordain, that the said register, or his deputy or substitute, offending in all or any of the premises, shall by the bishop of the diocese be suspended from the exercise of his office, for the space of one, two, or three months or more, according to the quality of his offence; and that the said bishop shall assign some other public notary to execute and discharge all things pertaining to his office, during the time of his said suspension."

A Spiritual
Officer.

3. Dr. Godolphin says, if there be a question between two persons touching several grants, which of them shall be register of the bishop's court; this shall not be tried in the bishop's court, but at the common law; for although the *subjectum circa quod* be spiritual, yet the office itself is temporal (f).

So in the case of *The King v. Ward*, H., 4 Geo. 2, there was a mandamus to Dr. Ward, the commissary, to admit

(e) Gibs. 996.

(f) God. 125.

Henry Dryden to be deputy register of the Archbishop of York's court: suggesting that Dr. Thomas Sharpe had been admitted to the office, to execute the same by himself or his deputy; that he had appointed Dryden (who is averred to be a fit person) to be his deputy, whom the commissary had refused to admit, to the great damage of Dr. Sharpe who complains; and therefore the writ commands the commissary to admit and swear Dryden, or show cause to the contrary. To this the commissary returns; that long before the constituting Dryden to be deputy, John Sharpe and Thomas Sharpe were admitted to the office as principals, to hold for their lives, and the live of the survivor; that they, in the year 1714, appointed John Shaw to be their deputy, who executed the office till John Sharpe died; that Thomas Sharpe survived, and on May 12, 1727, by a new appointment constituted Shaw his deputy, who was admitted, and executed the office until suspended in the manner after mentioned; that Shaw at the time of his admission took an oath that he should justly and honestly execute the office, without favour or reward, and do every thing incumbent on the office, and not be an exacter or greedy of rewards; and then sets forth the 134th canon; and further, that whilst Shaw was deputy, several proctors of the court on the 16th of February, 1727, exhibited to the commissary several articles against him, complaining of divers misbehaviours in his office, contrary to several of the particulars set forth in the said canon; that Shaw being summoned on the 6th of April, 1728, gave in his answer in writing (which is set forth); and then the return goes on, that forasmuch as it appeared to the commissary that the answer was insufficient, and that Shaw had confessed himself guilty of several omissions and extortions in the exercise of his office, therefore upon complaint thereof to the archbishop, he on the 21st of May, 1728, by his commission under his archiepiscopal seal directed to the commissary and reciting that Shaw had been guilty in the manner beforementioned, doth therefore empower the commissary to suspend him and assume another notary public; that by virtue thereof, he on the 24th of May, 1728, suspended Shaw for five years, and assumed Joseph Leech a notary public, who before the constituting Dryden to be deputy, took upon him and hath ever since executed the office: that Shaw appealed, and in that appeal alleged, that on the 23d of May, 1728, he resigned the office, and that Dr. Sharpe had appointed William Smith to be deputy; that delegates were appointed, who on the 23d of October, 1728, issued an inhibition to the commissary, that pending the appeal he should do nothing to the prejudice of the appellant; that the appeal remains undetermined; and for these reasons he cannot admit Dryden to be the deputy of Dr. Sharpe. Strange argued, that the return was ill, and that there ought to be a peremptory

Mandamus to admit.

Mandamus to
admit.

mandamus; which argument was to the following effect: "I must observe in general, that there is no incapacity returned in Dryden, no want of any regular appointment or deputation; on the contrary, it appears that Dr. Sharpe had a power to make a deputy, and that he had executed it with regard to Dryden. As therefore Dryden hath *primâ facie* a regular title to the office, the commissary who is to admit him ought not to refuse to do his duty; especially considering, that the admission gives no right, but only a legal possession, to enable him to assert his right if he has any. And upon this foundation it is, that *non fuit electus* hath been held no good return to a mandamus to swear in a churchwarden, because it is directed only to a ministerial officer, who is to do his duty, and no inconvenience can follow; for if the party hath a right, he ought to be admitted; if he hath not, the admission will do him no good. This effect of a mandamus to admit, was laid down in the case of *The King v. The Dean and Chapter of Dublin*, H., 7 Geo. 1, which was a mandamus to admit one Dougate to his seat in the choir and his voice in the chapter; for wherever the office is but ministerial, he is to execute his part, let the consequence be what it will. In the case of *The King v. Simpson*, M., 11 Geo. 1, there was a mandamus to the Archdeacon of Colchester, to swear Rodney Fane into the office of churchwarden; the archdeacon returned, that before the coming of the writ he received an inhibition from the bishop; but the court held that was no excuse, and that a ministerial officer is to do his duty, whether the act will be of any validity or not. In the case of *Taylor v. Raymond*, M., 4 Geo. 1, to a mandamus to swear in a churchwarden, it was returned, that before the coming of the writ he had sworn in another, and it was held an ill return, for be the right which way it will, the officer is to do his duty. These two last cases are both in point; in one there was an inhibition (as there is in this case), and in the other there was another officer, as they pretend there is here, to wit, Joseph Leech. But what is that inhibition? it is, to do nothing that may prejudice the appeal. Can this hurt Shaw? no; if he is relieved on the appeal, he will be restored, though another is admitted; if he is not relieved, it must be for want of a right, and he will not be capable of suffering any prejudice by the other's admission. But what takes off all pretence of the inhibition's being material in this case is, that it appears by Shaw's own showing, that he had the day before his suspension surrendered his deputation; and that accounts for the last part of the return, that the appeal is undetermined; it not being of any consequence to Shaw to prosecute it any further; besides, this would be to deprive Dr. Sharpe of the benefit of this office as long as Shaw should think fit to sleep upon the appeal, Dr. Sharpe having no power to expedite the determination. A deputy is but at will; and this is to deprive

Dr. Sharpe of his will for five years; which suspension I take to be illegal; for the expression in the canon of such a number of months *or more*, must have a reasonable construction, and can never be extended to five years. Shaw is entirely divested of the office, which answers the purpose of reformation better than a bare suspension. As therefore the office is vacant, there can be no reason why the commissary should refuse to fill it up; and a peremptory mandamus ought to go." And by the court: Surely it is attempting too much, to support this as a good return; the effect of a mandamus, as laid down, is certainly so, that it gives no right. The canon only intended, that the bishop should suspend, where the principal would not revoke; but an actual revocation is better than a suspension. It would be carrying the power of inhibitions a great way, if we should allow them the force contended for by the return. We are therefore all of opinion, that the return is ill. Then exception was taken to the writ, that a mandamus would not lie for a deputy; and for this was cited 6 Mod. 18, where Holt, Chief Justice, lays it down, that for a deputy a mandamus will not lie. But it was answered, that this is not a mandamus for the deputy, but for the principal to be admitted to have a deputy; the refusal of Dryden is laid to be, to the great damage of Dr. Sharpe, and therefore to do Dr. Sharpe right in the premises is the writ awarded; it appears that Dr. Sharpe has a freehold in the office, so though his deputy is but at will, he hath it for life; and in 1 Ventr. 110, a mandamus was granted to restore a person to the office of deputy steward of the court of the council of the Marches, and it was held to lie for a revocable deputy, because the principal hath no other way to get him admitted; and in the report of the same case in 1 Lev. 306, it is said by the court, that although a mandamus doth not lie for a deputy, yet it lies for him who deposes him, to have him admitted or restored, for otherwise he may be deprived of his power to make a deputy. Then it was further objected, that a mandamus doth not lie for a spiritual office; and for this were cited divers cases, where it was determined that a mandamus will not lie for a proctor, who belongeth as much to the ecclesiastical court as the register doth. Unto which it was answered, that this is not any objection; a mandamus hath been granted to admit an under-schoolmaster, and yet schoolmasters are within the canons of 1603 as well as registers; so in the case of Mr. Folks lately, for the office of apparitor-general of the Archbishop of Canterbury; so it hath been often granted for a parish clerk; for a sexton; so in like manner it was granted to restore Dr. Bentley to his degrees; and to admit Dr. Sherlock to a prebend at Norwich; and it is to be observed, that no assize will lie for this office, therefore if the party hath not this remedy, he hath none; the reason why it was refused to a proctor was, because

Mandamus to admit.

it did not appear what interest he had, but here appears a freehold. And by the court: We all think this writ is good, notwithstanding the exceptions that have been taken, and therefore a peremptory mandamus must go (*g*).

Deputy
Registrar.

[In *Rex v. The Bishop of Gloucester* the registrars of a diocese were authorized by their patent of office (under the bishop's hand and seal) to appoint a deputy "to be approved of and allowed by the bishop," who if he should not approve of and allow the deputy named and proposed to him, was empowered to nominate another with a salary payable out of the profits of the registrarship. The registrars appointed a deputy, subject to the approval of the bishop, who declared that "for good and sufficient reasons," which he did not specify, that he disapproved of the party nominated. In this case the court refused a rule nisi for a mandamus to the bishop to admit the deputy (*h*).

[In the case of *The Bishop of Bangor*, who was prosecuted at the Shrewsbury Assizes in 1796, by the deputy registrar of the Consistorial Court, for a riot and assault in forcibly taking possession of his room in the chapter house, Mr. Justice Heath intimated his doubt whether the bishop had the power of withdrawing his confirmation once given of this officer's appointment, and his strong opinion that at all events he must have recourse to a proceeding at common law. The jury, however, acquitted the plaintiff. This case has obtained great celebrity, from the speech delivered by Lord Erskine in his defence of the bishop (*i*).

Under 3 & 4
Vict. c. 113.

Penalty for
Neglect of
Registration.

[The 3 & 4 Vict. c. 113, enacts, that the orders in council carrying into effect the recommendations of the Ecclesiastical Commissioners shall be gazetted; and also, s. 88, "That the registrar of every diocese to whom any order of her majesty in council made by virtue of this act shall be delivered shall forthwith register the same in the registry of his diocese; and if any such registrar shall refuse or neglect to register any such order, he shall for every day during which he shall so offend forfeit 20*l.*, and if his offence shall continue for the space of three months he shall forfeit his office, and it shall be lawful for the bishop of the diocese to appoint a successor thereto."

Fee to Re-
gistrar.

[Sect. 89. "That for such registration as aforesaid the registrar shall not be entitled to receive any fee or reward, but on every search for any such order he shall be entitled to receive a fee of three shillings, and for every copy or extract of any such order certified by him he shall be entitled to receive four-pence for every folio of ninety words; and the copy of

(*g*) Str. 893.

(*h*) [2 B. & Adol. 158.]

(*i*) [See the whole trial reported, vol. i. of Lord Erskine's Speeches.—Ed.]

every such entry, certified by the registrar, shall be admissible as evidence in all courts and places whatsoever."

[The 1 & 2 Vict. c. 106, enacts, by s. 116, "That if the registrar of any diocese shall refuse or neglect to make any entry, or to do any other matter or thing prescribed by this act, he shall forfeit for every such refusal or neglect the sum of 5*l*." (*j*).

Under 1 & 2
Vict. c. 106.

Penalty on
Registrar for
Neglect.

[And the 52 Geo. 3, c. 146, enacts, by s. 8, "That the registrar of every diocese in England shall, on or before the 1st of July, 1814, and on or before the 1st of July in every subsequent year, make a report to the bishop of such diocese, whether the copies of the registers of the baptisms, marriages and burials, in the several parishes and places within such diocese have been sent to such registrar, in the manner and within the time herein required; and in the event of any failure of the transmission of the copies of the registers as herein required, by the churchwardens and chapelwardens of any parish or chapelry in England, the registrar shall state the default of the parish or chapelry, specially in his report to the bishop."

Under
52 Geo. 3,
c. 146.

Registrars to
make Reports
to Bishops,
whether Co-
pies have
been sent in.

[For a further account of the duties and functions of a registrar in all matters connected with the conduct of a suit in the ecclesiastical courts, see the title *Practice*. And so far as this officer is to be considered solely as a notary public, see the title *Notary Public*, in this volume.—ED.]

Register Book.

- | | |
|---|--|
| 1. <i>Of Parish Registers in general before 22 Geo. 3, c. 146</i> 459 | 3. <i>How far Evidence</i> 468 |
| 2. <i>Since that Act</i> 461 | 4. <i>To whose Custody the Parish Register belongs</i> 470 |

I. *Of Parish Registers in general.*

THE keeping of a church book for the age of those that should be born and christened in the parish began in the thirtieth year of King Henry the Eighth (*k*).

Of Registers
in general.

And the following canon, in the main of it, was only a reinforcement of one of the Lord Cromwell's injunctions in the year 1538; which was continued in those of King Edward the Sixth and of Queen Elizabeth; in whose reign a protestation being appointed to be made by ministers at institution, one head of it was—I shall keep the register book, according to the queen's majesty's injunctions (*l*).

(*j*) [See preceding title of *Privileges and Restraints of the Clergy*.]

(*k*) God. 144, 145; 3 Burnet, 139.

(*l*) Gibs. 204.

By can. 70, "In every parish church and chapel within this realm shall be provided one parchment book at the charge of the parish, wherein shall be written the day and year of every christening, wedding, and burial, which have been in the parish since the time that the law was first made in that behalf, so far as the ancient books thereof can be procured, but especially since the beginning of the reign of the late queen. And for the safe keeping of the said book, the churchwardens, at the charge of the parish, shall provide one sure coffer, and three locks and keys; whereof one to remain with the minister, and the other two with the churchwardens severally; so that neither the minister without the two churchwardens, nor the churchwardens without the minister, shall at any time take that book out of the said coffer. And henceforth upon every sabbath day, immediately after morning or evening prayer, the minister and churchwardens shall take the said parchment book out of the said coffer, and the minister in the presence of the churchwardens shall write and record in the said book the names of all persons christened, together with the names and surnames of their parents, and also the names of all persons married and buried in that parish, in the week before, and the day and year of every such christening, marriage, and burial; and that done, they shall lay up that book in the coffer as before: And the minister and churchwardens, unto every page of that book, when it shall be filled with such inscriptions, shall subscribe their names. And the churchwardens shall once every year, within one month after the five and twentieth day of March, transmit unto the bishop of the diocese, or his chancellor, a true copy of the names of all persons christened, married, or buried in their parish in the year before (ended the said five and twentieth day of March), and the certain days and months in which every such christening, marriage, and burial was had, to be subscribed with the hands of the said minister and churchwardens, to the end the same may faithfully be preserved in the registry of the said bishop; which certificate shall be received without fee. And if the minister or churchwardens shall be negligent in performance of any thing herein contained, it shall be lawful for the bishop or his chancellor to convent them, and proceed against every of them as contemners of this our constitution."

Of Burials in particular.

By the 30 Car. 2, c. 5, s. 7, for burying in woollen, it is enacted, "that the minister of every parish shall keep a register in a book to be provided at the charge of the parish, and make a true entry of all burials within his parish, and of all affidavits of persons being buried in woollen brought unto him according to the said act; and where no such affidavit shall be brought unto him within the time therein limited, he shall enter a memorial thereof in the said registry, against the name

of the party interred, and of the time when he notified the same to the churchwardens or overseers of the poor according to the said act."

[II. *Since the Statute of 52 Geo. 3, c. 146.*

[The previous regulations upon this subject of the 6 & 7 Will. 3, c. 6; of 9 & 10 Will. 3, c. 35, s. 4; of 26 Geo. 2, c. 33, are merged in 52 Geo. 3, c. 146.

[This act is repealed as far as it relates to the registration of marriages (*m*), but the registration of baptisms and burials is not affected by any subsequent enactment (*n*). This statute, "for the better regulating and preserving Parish and other Registers of Births, Baptisms, Marriages and Burials in England," was passed on the 28th of July, 1812: after reciting in its preamble that an amendment in the manner of keeping Registers "would greatly facilitate the proofs of pedigrees," and be otherwise of great public benefit, it enacts:

["That from and after the 31st day of December, 1812, registers of public and private baptisms, marriages, and burials, solemnized according to the rites of the United Church of England and Ireland, within all parishes or chapelries in England, whether subject to the ordinary or peculiar, or other jurisdiction, shall be made and kept by the rector, vicar, curate or officiating minister of every parish, (or of any chapelry where the ceremonies of baptism, marriage and burial, have been usually and may according to law be performed) for the time being, in books of parchment, or of good and durable paper, to be provided by his majesty's printer as occasion may require, at the expense of the respective parishes or chapelries; whereon shall be printed, upon each side of every leaf, the heads of information herein required to be entered in the registers of baptisms, marriages and burials respectively, and every such entry shall be numbered progressively from the beginning to the end of each book, the first entry to be distinguished by number 1; and every such entry shall be divided from the entry next following by a printed line, according to the forms contained in the schedules (A.), (B.), (C.), hereto annexed; and every page of every such book shall be numbered with progressive numbers, the first page being marked with the number 1 in the middle of the upper part of such page, and every subsequent page being marked in like manner with progressive numbers, from number 1 to the end of the book."

52 Geo. 3,
c. 146.

Officiating
Ministers
to keep Re-
gisters of
Public and
Private Bap-
tisms, of Mar-
riages and of
Burials.

Parishes to
provide suit-
able Books
for that Pur-
pose.

(*m*) [See title **Marriage Acts**, vol. ii. for s. 1 of 6 & 7 Will. 4, c. 86.—**ED.**]

(*n*) [The 49th section of 6 & 7 Will. 4, c. 86, provides, "that nothing therein contained shall affect

the registration of baptisms and burials as now by law established, or the right of any officiating minister to receive the fees now usually paid for the performance or registration of baptisms, burial or marriage."—**ED.**]

SCHEDULE (A.)

1.					
<i>BAPTISMS solemnized in the Parish of St. A. in the County of B. in the Year One thousand eight hundred and thirteen.</i>					
When Bap- tized.	Child's Christian Name.	Parents' Name.		Abode.	By whom the Ceremony was per- formed.
		Christian.	Surname.		
1813. 1st February No. 1.	John Son of	William Elizabeth		Lambeth	
3d March No. 2.	Ann Daughter of	Henry Martha		Fulham	

SCHEDULE (B.)

1.	
<i>MARRIAGES solemnized in the Parish of St. A. in the County of B. in the Year One thousand eight hundred and thirteen.</i>	
A. B. of { the } Parish and C. D. of { this } Parish were married in this { Church } by { Banns } with Consent of { Parents } this — day of — in the year —. { Chapel } { Licence } { Guardians }	
By me, I. I. { Rector } { Vicar } { Curate }	
This marriage was solemnized between us { A. B. } { C. D. }	
In the Presence of { E. F. } { G. H. }	

SCHEDULE (C.)

1.				
<i>BURIALS in the Parish of A. in the County of B. in the Year One thousand eight hundred and thirteen.</i>				
Name.	Abode	When Buried.	Age.	By whom the Ceremony was performed.
John Wilson No. 1.	Duke Street, Westminster.	1813. 1st May.	62	

[Sect. 2. "And, for better ensuring the regularity and uniformity of such register books, be it further enacted, that a printed copy of this act, together with one book so prepared as aforesaid, and adapted to the form of the register of baptisms prescribed in the schedule (A.) to this act annexed; and also one other book so prepared as aforesaid, and adapted to the form prescribed for the register of marriages in the schedule (B.) to this act annexed; and also one other book so prepared as aforesaid, and adapted to the form prescribed for the register of burials in the schedule (C.) to this act annexed, shall, as soon as conveniently may be after the passing of this act, be provided and transmitted by his majesty's printer to the officiating ministers of the several parishes and chapelries in England respectively, who are hereby required to use and apply the same in and to the purposes of this act; and such books respectively shall be proportioned to the population of the several parishes and chapelries, according to the last returns of such population made under the authority of parliament; and other books of like form and quality shall for the like purposes be furnished from time to time by the churchwardens or chapelwardens of every parish or chapelry, at the expense of the said parish or chapelry, whenever they shall be required by the rector, vicar, curate, or officiating minister to provide the same: and all such books shall be of paper, unless required to be of parchment by such churchwardens or chapelwardens respectively."

52 Geo. 3,
c. 146.

King's Printer to transmit to each Parish a printed Copy of Act, and Register Books adapted to Forms prescribed.

[Sect. 3. "That such registers shall be kept in such separate books aforesaid, and that every such rector, vicar, curate, or officiating minister, shall as soon as possible after the solemnization of every baptism, whether private or public, or burial respectively, record and enter in a fair and legible handwriting, in the proper register book to be provided, made, and kept as aforesaid, the several particulars described in the several schedules hereinbefore mentioned, and sign the same; and in no case, unless prevented by sickness, or other unavoidable impediment, later than within seven days after the ceremony of any such baptism or burial shall have taken place."

Registers in separate Register Books.

[Sect. 4. "That whenever the ceremony of baptism or burial shall be performed in any other place than the parish church or churchyard of any parish (or the chapel or chapel yard of any chapelry, providing its own distinct registers) and such ceremony shall be performed by any minister not being the rector, vicar, minister, or curate of such parish or chapelry, the minister who shall perform such ceremony of baptism or burial shall, on the same or on the next day, transmit to the rector, vicar, or other minister of such parish or chapelry, or his curate, a certificate of such baptism or burial in the form contained in the schedule (D.) to this act annexed, and the rector, vicar, minister, or curate of such parish or chapelry, shall thereupon enter such baptism or burial according to such certificate in the book kept pursuant to this act for such purpose; and shall add to such entry the following words, 'According to the certificate of the Reverend — transmitted to me on the — day of —.'"

Certificate of Baptism, &c. when performed in other Place than Parish Church, &c. according to Schedule (D.) Entry of Baptism, &c. distinguished accordingly.

SCHEDULE (D.)

"I — do hereby certify, that I did on the — day of —

52 Geo. 3,
c. 146.

baptize, according to the rites of the United Church of England and Ireland, — son [or “daughter,”] of — and — his wife, by the name of —.

To the Rector [or, as the case may be,] of —.

“ ‘ I — do hereby certify, that on the — day — A. B. of — aged — was buried in [stating the place of burial], and that the ceremony of burial was performed according to the rites of the United Church of England and Ireland, by me, —.

To the Rector [or, as the case may be,] of —.’ ”

[Sect. 5 relates to the custody of the register books, which see below.

Annual Co-
pies of Re-
gisters made;
and verified
by Officiating
Minister.

[Sect. 6. “ That at the expiration of two months after the 31st day of December, 1813, and at the expiration of two months after the end of every subsequent year, fair copies of all the entries of the several baptisms, marriages, and burials, which shall have been solemnized or shall have taken place within the year preceding, shall be made by the rector, vicar, curate, or other resident or officiating minister, (or by the churchwardens, chapelwardens, clerk, or other person duly appointed for the purpose, under and by the direction of such rector, vicar, curate, or other resident or officiating minister) on parchment, in the same form as prescribed in the schedules hereunto annexed (to be provided by the respective parishes); and the contents of such copies shall be verified and signed in the form following, by the rector, vicar, curate, or officiating minister of the parish or chapelry to which such respective register book shall appertain :

‘ I, A. B., rector [or, as the case may be,] of the parish of C. [or, “ of the chapelry of D.”] in the county of E., do hereby solemnly declare, that the several writings hereto annexed, purporting to be copies of the several entries contained in the several register books of baptisms, marriages, and burials, of the parish or chapelry aforesaid, from the — day of — to the — day of —, are true copies of all the several entries in the said several register books respectively from the said — day of — to the said — day of —; and that no other entry during such period is contained in any of such books respectively, are truly made according to the best of my knowledge and belief.

‘ Signed A. B.’

Which declaration shall be fairly written, without any stamp, on the said copy immediately after the last entry therein ; and the signature to such declaration shall be attested by the churchwardens or chapelwardens, or one of them, of the parish or chapelry to which such register books shall belong.

Annual Co-
pies of Re-
gister Books
transmitted
to Registrar
of Diocese.

[Sect. 7. “ That copies of the said register books, verified and attested as aforesaid, shall, whether such parish or chapelry shall be subject to the ordinary, peculiar, or other jurisdiction, be transmitted by such churchwardens or chapelwardens, after they, or one of them, shall have signed the same, by the post, to the registrars of each diocese in England within which the church or chapel shall be situated, on or before the 1st day of June, 1814, and on or before the 1st day of June in every subsequent year.

[Sect. 8 enjoined registrars to report to bishops whether copies of the registers had been sent in (o).

52 Geo. 3,
c. 146.

[Sect. 9. "That in case the rector, vicar, or other officiating minister or curate of any parish or chapelry shall neglect or refuse to verify and sign such copies of such several register books, and such declaration as aforesaid, so that the churchwardens or chapelwardens shall not be able to transmit the same, as required by this act, such churchwardens or chapelwardens shall, within the time required by this act for the transmission thereof, certify such default to the registrar of the diocese within which such parish or chapelry shall be, who shall specially state the same in his report to the bishop of such diocese."

Officiating
Minister neg-
lecting to ve-
rify Copies of
Register
Books,
Churchwar-
dens to cer-
tify Default.

[Sect. 10. "And, for the obtaining of returns and registers of baptisms and burials in extra-parochial places in England, where there is no church or chapel, be it further enacted, that in all cases of the baptism of any child, or the burial of any person in any extra-parochial place in England, according to the rites of the established church, where there is no church or chapel, it shall be lawful for the officiating minister, within one month after such baptism or burial, to deliver to the rector, vicar, or curate of such parish immediately adjoining to the place in which such baptism or burial shall take place, as the ordinary shall direct, a memorandum of such baptism or burial, signed by such parent of the child baptized, or a memorandum of such burial, signed by the person employed about the same, together with two of the persons attending the same, according as the nature of the case may respectively require; and every such memorandum respectively shall contain all such particulars as are hereinbefore required; and every such memorandum delivered to the rector, vicar, or curate of any such adjoining parish or chapelry, shall be entered in the register of his parish, and form a part thereof."

Places where
no Church,
&c. Memo-
randum of
Baptisms, &c.
delivered to
Officiating
Minister of
adjoining Pa-
rish.

[Sect. 11. "That the superscription upon all letters and packets containing the copies of such parish or other registers, to be transmitted by the post to the several offices of the said registrars as aforesaid, shall be indorsed and signed by the churchwardens or chapelwardens of every respective parish and chapelry in England, in the form contained in schedule (E.); and that all such letters and packets shall be carried and conveyed by means of his majesty's post office to and be delivered at the offices of the said registrars, without postage or other charge being paid or payable for the same."

Letters, &c.
containing
Annual Co-
pies of Regis-
ter Books free
of Postage.

SCHEDULE (E).

To the Registrar of the diocese of —
at —
A. B. } *Churchwardens* [or "chapelwardens"] *of the parish* [or
C. D. } "chapelry"] *of —* [or such other description as the case
may require].

[Sect. 12. "That when and so often as the copies of the said register books of baptisms, marriages, and burials as aforesaid, and also the said lists of births, baptisms, marriages, or burials as afore-

Annual Co-
pies of Regis-
ter Books
when trans-
mitted to Re-
gistrars, kept
from Damage.

(o) [See title **Registrar.**]

52 Geo. 3,
c. 146.

Alphabetical
Lists.

Report to
Privy Council
on or before
1st March,
1813, respect-
ing proper
Places for
Preservation
of Copies of
Register
Books, as well
as Original
Wills in each
Diocese; and
for Remu-
neration of
Registrars'
Officers.

False Entries,
or false Co-
pies of En-
tries, or al-
tering, &c.
Register
Book.

said, shall be transmitted to the office of the said registrars respectively, as aforesaid, pursuant to the directions hereinbefore contained for that purpose, the said registrars shall respectively cause all the said books and lists to be safely and securely deposited, kept and preserved from damage or destruction by fire or otherwise, and to be carefully arranged for the purpose of being resorted to as occasion may require; and the said registrars respectively shall also cause correct alphabetical lists to be made and kept in books suitable to the purpose, of the names of all persons and places mentioned in such books and lists as shall have been transmitted to the said registrars respectively, which alphabetical lists and books, and also the copies of registers and lists so transmitted to the said registrars as aforesaid, shall be open to public search at all reasonable times on payment of the usual fees."

[Sect. 13. " ' And whereas in many dioceses the places wherein the copies of the parochial registers of baptisms, marriages and burials, as well as the original wills proved within the same respectively are kept, are insufficient for their being preserved with due care; for which a remedy should be applied in those dioceses where it shall be found necessary; ' be it further enacted, That, in order to a due examination thereof, the bishop, together with the *custodes rotulorum* of the several counties within each diocese, and the chancellor thereof, shall, before the 1st day of February, 1813, cause a careful survey to be made of the several places in which the parochial registers and the wills proved within the diocese are kept; and shall make a report to his majesty's most honourable privy council of the state of the same, on or before the 1st day of March following, setting forth in each case whether the buildings are in all respects fit and proper for the preservation of papers of the above description, as well with respect to space as to security from fire, and to protection from damp, and if not, at what probable expense they can be made so; and where the instruments and papers before mentioned are kept in dwelling-houses or other places, which cannot be made fit and secure for the due preservation thereof, then and in such case the persons before named shall inquire and report in like manner at what expense proper buildings may be provided, and in what places so as to have one place within each diocese for the due preservation of all such registers and wills; together with their opinion upon the most suitable mode of remunerating the officers employed in each registry, for their additional trouble and expense in carrying the provisions of this act into execution."

[Sect. 14. " That if any person shall knowingly and wilfully insert, or cause or permit to be inserted, in any such register book of such baptisms, burials or marriages as aforesaid, or in any such copy of any such register so directed to be transmitted to the registrars as aforesaid, or in any such lists or declarations also directed to be transmitted to such registrars as aforesaid, any false entry of any matter or thing relating to any baptism, burial or marriage, or shall falsely make, alter, forge or counterfeit, or cause or procure, or wilfully permit to be falsely made, altered, forged or counterfeited, any part of any such register, list or declaration, or of any such copy of any such register; or shall wilfully destroy,

deface or injure, or cause or procure, or permit to be destroyed, defaced or injured, any such register book, or any part thereof; or shall knowingly and wilfully sign, or certify any copy of any such register hereby required to be transmitted as aforesaid, which shall be false in any part thereof, knowing the same to be false; every person so offending, and being thereof lawfully convicted, shall be deemed and adjudged to be guilty of felony, and shall be transported for the term of fourteen years."

52 Geo. 3,
c. 146.

Transporta-
tion.

[Sect. 15. "Provided always, that no rector, vicar, curate or officiating minister of any parish or chapel, who shall discover any error to have been committed in the form or substance of the entry in the register book of any such baptism, burial or marriage, respectively by him solemnized, shall be liable to all or any of the penalties herein mentioned, if he shall within one calendar month after the discovery of such error, in the presence of the parent or parents of the child whose baptism may have been entered in such register, or of the parties married, or in the presence of two persons who shall have attended at any burial, or in case of the death or absence of the respective parties aforesaid, then in the presence of the churchwardens or chapelwardens, (who shall respectively attest the same), alter and correct the entry which shall have been found erroneous, according to the truth of the case, by entry in the margin of the book wherein such erroneous entry shall have been made without any alteration or obliteration of the original entry, and shall sign such entry in the margin, and add to such signature the day of the month and year when such correction shall be made: provided also, that in the fair copy of the registers respectively which shall be transmitted to the registrars of the dioceses, the said rector, vicar, curate or officiating minister, shall certify the alterations so made by him as aforesaid."

Persons com-
mitting acci-
dental Errors
not affected,
if duly cor-
rected accord-
ing to Truth
of Case.

[Sect. 16. "Provided always, that nothing in this act contained shall in any manner diminish or increase the fees heretofore payable or of right due to any minister for the performance of any of the before-mentioned duties, or to any minister or registrar, for giving copies of such registrations, but that all due, legal and accustomed fees on such occasions, and all powers and remedies for recovery thereof, shall be and remain as though this act had not been made."

Fees hereto-
fore payable.

Proviso for.

[Sect. 17. "Provided also, that no duplicate or copy of any register of baptism, marriage or burial, made under the directions and for the purposes of this act, shall be chargeable with any stamp duty thereon; any act now in force to the contrary thereof in any wise notwithstanding."

Copy of Re-
gister Books
not subject to
Stamp Duty.

[Sect. 18. "That one half of the amount of all fines or penalties to be levied in pursuance of this act shall go to the person who shall inform or sue for the same; and the remainder of such fines as shall be imposed on any churchwarden or chapelwarden shall go to the poor of the parish or place for which such churchwarden or chapelwarden shall serve; and the remainder of such fines as shall be imposed on any rector, vicar, minister or curate, or registrar, shall be paid and applied to such charitable purposes, in the county within which the parish or place shall be, as shall be appointed and directed by the bishop of the diocese."

Application
of Penalties.

[Sect. 19. "That the rector, vicar, curate or officiating minister

List of extant
Register

52 Geo. 3,
c. 146.

Books trans-
mitted to Re-
gistrar before
1st June,
1813.

Act to extend
to Churches
and Chapels
not Parochial.

of every parish and chapelry in England, whether subject to the ordinary, peculiar or other jurisdiction, shall transmit to the registrar of the diocese in which the parish or chapelry shall be situated, before the 1st day of June, 1813, a list of all registers which now are in such parish or chapelry respectively, stating the periods at which they respectively commence and terminate, the periods (if any) for which they are deficient, and the places where they are deposited."

[Sect. 20. "That all and every the provisions in this act shall extend, so far as circumstances will permit, to cathedral and collegiate churches, and chapels of colleges or hospitals, and the burying grounds belonging thereto; and to the ministers who shall officiate in such cathedral or collegiate churches, and chapels of colleges or hospitals, and burying grounds respectively, and shall baptize, marry or bury any person or persons, although such cathedral or collegiate churches or chapels of colleges or hospitals, or the burying grounds belonging thereto, may not be parochial, or the ministers officiating therein may not be, as such, parochial ministers, and there shall be no churchwarden or churchwardens thereof; and in all such cases, the books hereinbefore directed to be provided, shall be provided at the expense of the body having right to appoint the officiating minister in every such cathedral or collegiate church or chapel of a college or hospital; and copies thereof shall be transmitted to the registrar of the diocese within which such cathedral or collegiate church or chapel of a college or hospital shall be, by the officiating minister of such church, in like manner as is herein directed with respect to parochial ministers, and shall be attested by two of the officers of such church, college or hospital, as the copies of parochial registers are herein directed to be attested by churchwardens: provided always, that nothing in this act contained shall extend to repeal any provision contained in an act passed in the twenty-sixth year of the reign of his late majesty King George the Second, intituled "An Act for better preventing Clandestine Marriages."

Marriage Act,
26 Geo. 2,
c. 33.
Proviso for.

III. *How far Parish Registers are considered as Public Books, and admitted as Evidence.*

E., 6 Geo. 2, *Dormer v. Ekyns*. Mr. Abney moved for an information in the Court of King's Bench against Mr. Ekyns, rector of the parish church of Walton, and against Mr. Bonner, curate of the same church, for refusing to give Mr. Dormer copies of certain parts of a register belonging to that parish, and likewise for refusing to give him a certificate of certain persons of the family of the Dormers being born in that parish. He said, that an ejectment was depending in this court at the time this refusal was made, and still continued to be so, between Mr. Dormer and Mr. Parkerson and his wife, concerning certain lands which the plaintiff claimed as heir male of the Dormer family. Several of that family were born in the parish of Walton; and for this reason it was necessary to have copies of several parts of the register, and likewise a certificate of the birth of many in that family. Accordingly Mr. Dormer

made his application to the rector and curate of that parish for this purpose, and offered to pay them for the same; but they refused letting him have them; and the only reason they gave was, that Mr. Parkerson and his wife were the defendants, and they would do nothing to their prejudice. Of this fact he said he had an affidavit; and for such an extraordinary denial of justice he hoped the court would grant an information. The court said, you have a right to inspect the public books of the parish; but cannot oblige the rector or curate to make you out either copies of those books, or a certificate; for which reason they could not grant the motion. Upon this he changed his motion, and desired a rule to inspect those books. The court said, motions to inspect the public books of corporations, they grant without an affidavit; but in motions to inspect the public books of a parish, an affidavit is always requisite. By such affidavit, they said too, it must be sworn, that the copies of them are necessary to be produced in evidence at a trial of a cause depending, and likewise that the inspection of those books to take copies has been demanded and refused. Now in the present case, the first part was sworn to, but not the latter; for which reason the court refused to make any rule at present (*p*).

[An entry in the register of the christening of a child, as to the time of its birth, is not of itself sufficient evidence of the age (*q*). If a parish register of baptisms state that the person baptized was born on a particular day, that is not evidence of the date of his birth (*r*). A register of baptism is not *per se* evidence of the place of birth of the party baptized (*s*); nor is a certificate of marriage evidence, unless it be shown as a copy of the parish register. But where, in an action to recover damages for criminal conversation with the plaintiff's wife, the proof of the marriage was an examined copy of the marriage register, and the person who examined the copy with the original register being acquainted with the handwriting of the plaintiff and his wife, stated that the signatures to the register were in their handwriting, it was held sufficient evidence to prove the identity of the parties to the marriage (*t*). A baptism cannot be proved by a minute written at the time by the parish clerk, nor by an entry in the parish register made at a subsequent period by a succeeding incumbent, founded only upon such minute (*u*). And it seems doubtful whether a parish register not kept according to the canon (*x*), which requires weekly entries, or whether a copy, without proof that the original cannot be found, would be admitted in evidence (*y*).

(*p*) 2 Barnard. 269.

per Tenterden; M. & M. 362.]

(*q*) [*Wiken v. Law*, 3 Stark. 63.]

(*u*) [*Doe d. Warren v. Bray*, 3 M.

(*r*) [*Rex v. Clapham*, 4 C. & P. 29,

& R. 428; 8 B. & C. 813.]

per Tenterden.]

(*x*) [See *Rex v. Bramley*, 6 T. R.

(*s*) [*Rex v. North Petherton*, 5 B. 330.]

& C. 508; 8 D. & R. 325.]

(*y*) [*Walker v. Wingfield*, 18 Ves.

(*t*) [*Bain v. Mason*, 1 C. & P. 202, jun. 443.]

And a copy of a register of baptism in the island of Guernsey has been held to be insufficient evidence of a person's majority (z). But a parish register has been received as evidence notwithstanding the loss of a leaf, which did not destroy the series of entries (a). Such registers are considered for certain purposes as public books, and persons interested in them have a right to inspect and take copies of such parts of them as relate to their interest (b).

[The 50th sect. of 1 & 2 Vict. c. 106, provides that copies of licences for non-residence, and all revocations of them, shall be kept in the registry of the diocese.—ED.]

IV. *Who has the Custody of the Parish Register.*

Note, the register book belongs to the parish, and the incumbent alone is not entrusted with the keeping of it, much less the curate. But by the canon above mentioned it is to be kept under three locks, the key of one only of which locks the minister is to keep, and the churchwardens the other two. So that the application in such case, as it seemeth, ought to be to the minister and churchwardens.

[The 52 Geo. 3, c. 146, enacts by sect. 5, "That the several books wherein such entries shall respectively be made, and all register books heretofore in use, shall be deemed to belong to every such parish or chapelry respectively, and shall be kept by and remain in the power and custody of the rector, vicar, curate or other officiating minister of each respective parish or chapelry as aforesaid, and shall be by him safely and securely kept in a dry well-painted iron chest, to be provided and repaired as occasion may require, at the expense of the parish or chapelry, and which said chest containing the said books shall be constantly kept locked in some dry, safe and secure place within the usual place of residence of such rector, vicar, curate or other officiating minister, if resident within the parish or chapelry, or in the parish church or chapel; and the said books shall not, nor shall any of them be taken or removed from or out of the said chest, at any time or for any cause whatever, except for the purpose of making such entries therein as aforesaid, or for the inspection of persons desirous to make search therein, or to obtain copies from or out of the same, or to be produced as evidence in some court of law or equity, or to be inspected as to the state and condition thereof, or for some of the purposes of this act; and that immediately after making such respective entries, or producing the said books respectively for the purposes aforesaid, the said books shall forthwith again be safely and securely deposited in the said chest."]

(z) [*Huet v. Le Mesurier*, 1 Cox, 275.]

(b) [2 Ld. Raym. 851; 2 Stra. 954; 1 Barnadist.; and see the fifth section of 52 Geo. 3, printed above.]

(a) [*Walker v. Wingfield*, 18 Ves. jun. 443.]

[Register Non-parochial.]

1. <i>Establishment of a General Registration</i> 471	2. <i>Non-parochial Register, — How far Evidence</i> 471
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[I. *Establishment of a General Registration.*

[A SELECT committee of the House of Commons, appointed in 1833, to consider the state of the parochial and the expediency of a general registration of births, baptisms, marriages and deaths, recommended the establishment of a national *civil* registration for these purposes. The result of their recommendation was the statute of the 6 & 7 Will. 4, c. 86 (a), by which his majesty was empowered to establish a general registrar office in London or Westminster, to divide England into districts, for the purposes of registration, to establish a registrar's office, and a superintendent registrar and deputies in each union, &c. The 49th section of this act contains the following provision:

["That nothing herein contained shall affect the registration of baptisms or burials as now by law established, or the right of any officiating minister to receive the fees now usually paid for the performance or registration of any baptism, burial, or marriage."

[The provisions of the statutes 6 & 7 Will. 4, c. 85; 7 Will. 4, c. 1; 1 Vict. c. 22; 3 & 4 Vict. c. 72, relating to the registration of marriages, will be found under the title *Marriage Acts*, in the second volume of this work.

[II. *Non-parochial Register, — How far Evidence, before and since 3 & 4 Vict. c. 92.*

[Before the establishment of a national *civil* registration as mentioned above, neither in the ecclesiastical nor in the temporal courts were *copies* of registries of dissenting chapels, or of records not preserved in legally recognized official custody, allowed to be pleaded as evidence. Sir John Nicholl said, "The *books themselves* might be produced at the hearing of the cause (b) and made evidence to a *certain* extent." The temporal courts, on the other hand, had refused in several instances to allow the birth of a child or the death of a person to be proved from the registers of dissenters (c).

[The great inconvenience resulting from this rule of law

(a) [The reader will find this act elaborately discussed in Mr. Shelford's work on "Marriage and Registration," p. 828.]

(b) [*Newman v. Raitby*, 1 Phill. 315.]

(c) [*Ex parte Taylor*, 1 G. & W. 483; *Whittuch v. Waters*, 4 C. & P. 375.]

caused a commission to be issued in 1836, for the purpose of ascertaining what remedy might best be applied to the evil. The history of the commission, and the very curious fruit of their investigation, will be found in their report laid before parliament on the 18th of June, 1838, which produced on the 10th of August, 1840, the statute of the 3 & 4 Vict. c. 92, entitled, "An Act for enabling Courts of Justice to admit Non-Parochial Registers as Evidence of Births or Baptisms, Deaths or Burials, and Marriages." And after reciting the object of the commission, and the nature of its report, proceeds to enact as follows:

3 & 4 Vict.
c. 92.
Certain Re-
gisters to be
deposited in
the Custody
of the Regis-
trar General.

Proviso as to
Registers not
received.

Continuance
of Commis-
sioners for
12 Months.
Their Duty.

Declaratory
Provisions
as to the
General
Register
Office.

["That the registrar general of births, deaths, and marriages in England shall receive, and deposit in the general register office, all the registers and records of births, baptisms, deaths, burials, and marriages now in the custody of the commissioners appointed by her Majesty as aforesaid, and which they have by their said report recommended to be kept in some secure place of deposit, and also the several registers and records mentioned in the schedules (H.), (I.), (P.), and (Q.), annexed to the said report of the said commissioners, and also such other registers as are hereinafter directed to be deposited with him: Provided that none of the said registers or records not already in the custody of the said commissioners shall be received by the registrar general, unless the person or persons now having the custody thereof shall, within three calendar months from the passing of this act, send the same to the said commissioners for examination by them."]

[Sect. 2. "That such of the said commissioners as are now living shall be continued commissioners for the purposes hereinafter mentioned, for the space of twelve calendar months from the passing of this act, and they are hereby authorized, from time to time during the said twelve months, to inquire into the state, custody and authenticity, of every register or record of birth, baptism, naming, dedication, death, burial, and marriage which shall be sent to them within three calendar months from the passing of this act, and such as they shall find accurate and faithful, they shall certify under the hands and seals of three, or more, of them (of whom the registrar general shall not be one), as fit to be placed with the other registers and records hereby directed to be deposited in the said office; and the registrar general, upon receiving the said certificate of the said commissioners, accompanied by an order of one of her Majesty's principal secretaries of state, shall receive such registers and records, and deposit them with the registers and records which are now in the custody of the said commissioners."]

[Sect. 3. "That every office or place where any registers or records which by this or any other act are directed to be in the custody of the registrar general shall be deposited by direction of the registrar general, with the approval of the lord high treasurer, or three or more commissioners of her Majesty's treasury, shall be deemed to be a branch or part of the general register office, so long as such registers or records shall remain therein, and the execution of this act shall be deemed to be a part of the business of the general register office."]

[Sect. 4. "That the said commissioners shall from time to time deliver to the registrar general a descriptive list or lists of all the registers and records now in their custody, and also of all the registers and records which shall be so certified as fit to be placed with the other registers and records in the general register office, containing such particulars, and referring to the registers and records in such manner, as in the opinion of the registrar general shall be sufficient to identify every such register and record; and three or more of the said commissioners, (of whom the registrar general shall not be one,) shall certify under their hands, upon some part of every separate book or volume containing any such register or record, that it is one of the registers or records deposited in the general register office pursuant to this act, and in every case in which the commissioners shall certify to the registrar general as aforesaid that certain parts only of such registers or records appear to them to be original or authentic, the commissioners shall refer in the descriptive list or lists, and also in the certificate upon such book or volume, to those parts, in such manner as to identify them to the satisfaction of the registrar general."

3 & 4 Vict.
c. 92.

Commissioners to identify the Registers deposited.

[Sect. 5. "That the registrar general shall cause lists to be made of all the registers and records which may be placed in his custody by virtue of this act; and every person shall be entitled, on payment of the fees hereinafter mentioned, to search the said lists, and any register or record therein mentioned, between the hours of ten in the morning and four in the afternoon of every day, except Sundays, and Christmas Day and Good Friday, but subject to such regulations as may be made from time to time by the registrar general, with the approbation of one of her Majesty's principal secretaries of state, and to have a certified extract of any entry in the said registers or records, and for every search in any such register or record shall be paid the sum of one shilling; and for every such certified extract the sum of two shillings and sixpence, and no more."

Lists to be made;

which shall be open to Search;

and certified Extracts had therefrom.

[Sect. 6. "That all registers and records deposited in the general register office by virtue of this act, except the registers and records of baptisms and marriages at the Fleet and King's Bench Prisons, at May Fair, at the Mint in Southwark, and elsewhere, which were deposited in the registry of the Bishop of London in the year one thousand eight hundred and twenty-one, as hereinafter mentioned, shall be deemed to be in legal custody, and shall be receivable in evidence in all courts of justice, subject to the provisions hereinafter contained; and the registrar general shall produce, or cause to be produced, any such register or record, on subpœna or order of any competent court or tribunal, and on payment of a reasonable sum, to be taxed as the court shall direct, and to be paid to the registrar general, on account of the loss of time of the officer by whom such register or record shall be produced, and to enable the registrar general to defray the travelling and other expenses of such officer."

Registers deemed in legal Custody, and shall be receivable in Evidence.

[Sect. 7. "That every sum received under the provisions of this act, by or on account of the registrar general, shall be accounted for and paid by the registrar general, at such times as the commissioners of her Majesty's treasury of the United Kingdom of

Fees to be accounted for.

3 & 4 Vict.
c. 92.

Great Britain and Ireland from time to time shall direct, into the Bank of England, to the credit of her Majesty's exchequer, according to the provisions of an act passed in the fourth year of his late majesty, King William the Fourth, intituled, 'An Act to regulate the Office of the Receipt of His Majesty's Exchequer at Westminster.'"

Wilful Injury or forgery of Registers, Felony.

[Sect. 8. "That every person who shall wilfully destroy or injure, or cause to be destroyed or injured, any register or record of birth or baptism, naming or dedication, death or burial, or marriage, which shall be deposited with the register general by virtue of this act, or any part thereof, or shall falsely make or counterfeit, or cause to be falsely made or counterfeited, any part of any such register or record, or shall wilfully insert or cause to be inserted in any of such registers or records any false entry of any birth or baptism, naming or dedication, death or burial, or marriage, or shall wilfully give any false certificate, or shall certify any writing to be an extract from any register or record knowing the same register or record to be false in any part thereof, or shall forge or counterfeit the seal of the said office, shall be guilty of felony."

Extracts from Registers to be stamped with the Seal of Office.

[Sect. 9. "That the registrar general shall certify all extracts which may be granted by him from the registers or records deposited or to be deposited in the said office, and made receivable in evidence by virtue of the provisions herein contained, by causing them to be sealed or stamped with the seal of the office; and all extracts purporting to be stamped with the seal of the said office shall be received in evidence in all civil cases, instead of the production of the original registers or records containing such entries, subject nevertheless to the provisions hereinafter contained."

Extracts to describe the Register whence taken.

[Sect. 10. "That every extract granted by the registrar general from any of the said registers or records shall describe the register or record from which it is taken, and shall express that it is one of the registers or records deposited in the general register office under this act; and the production of any of the said registers or records from the general register office, in the custody of the proper officer thereof, or the production of any such certified extract containing such description as aforesaid, and purporting to be stamped with the seal of the said office, shall be sufficient to prove that such register or record is one of the registers and records deposited in the general register office under this act, in all cases in which the register or record, or any certified extract therefrom, is herein respectively declared admissible in evidence."

Production of Register shall be sufficient.

Certified Extracts may be used in Courts of Law and Sessions, upon Notice given.

[Sect. 11. "That in case any party shall intend to use in evidence on the trial of any cause in any of the courts of common law, or on the hearing of any matter which is not a criminal case at any session of the peace in England or Wales, any extract, certified as hereinbefore mentioned, from any such register or record, he shall give notice in writing to the opposite party, his attorney or agent, of his intention to use such certified extract in evidence at such trial or hearing, and at the same time shall deliver to him, his attorney or agent, a copy of the extract, and of the certificate thereof; and on proof by affidavit of the service, or on admission of the receipt of such notice and copy, such certified

extract shall be received in evidence at such trial or hearing, if the judge or court shall be of opinion that such service has been made in sufficient time before such trial or hearing to have enabled the opposite party to inspect the original register or record from which such certified extract had been taken, or within such time as shall be directed by any rule to be made as hereinafter provided."

3 & 4 Vict.
c. 92.

[Sect. 12. "That in case any party shall intend to use in evidence on such trial or hearing any original register or record (instead of such certified extract), he shall nevertheless, within a reasonable time, give to the opposite party notice of his intention to use such original register or record in evidence, and deliver to such opposite party a copy of a certified extract of the entry or entries which he shall intend to use in evidence."

If the Original be used, Notice must nevertheless be given.

[Sect. 13. "That in case any party shall intend to use in evidence on any examination of witnesses, or at the hearing of any cause in any court of equity, any extract, certified as hereinbefore mentioned, he shall, ten clear days at the least before publication shall pass in any cause where no commission has issued for the examination of the witnesses of the party intending to give such evidence, or where such commission shall issue then seven clear days at the least before the opening of such commission, deliver to the clerk or clerks in court of the opposite party or parties a notice in writing of his intention to use such certified extract in evidence on the examination of witnesses or at the hearing of the cause (as the case may be), and shall at the same time deliver to the clerk or clerks in court of the opposite party or parties a copy or copies of such extract, and of the certificate thereof, and thereupon such certificated extract shall be received in evidence; provided that at the hearing of the cause the service of such certified copy and notice be admitted or proved by affidavit."

Certified Extracts may be used in Evidence on Examination of Witnesses, or at the Hearing of the Cause in Courts of Equity, upon Notice.

[Sect. 14. "That in case any party shall intend to use in evidence, on such examination or hearing in any court of equity, any original register or record (instead of such certificated extract), he shall nevertheless, within the number of days hereinbefore respectively mentioned, deliver to the clerk or clerks in court of the opposite party or parties a notice of his intention to use such original register or record in evidence, together with a copy of a certified extract of the entry or entries which he shall intend to use in evidence."

If the Original be used, Notice must nevertheless be given.

[Sect. 15. "That in case any party shall intend to use in evidence, upon any petition, motion, or other interlocutory proceedings in any court of equity or in the master's office, any extract, certified as hereinbefore mentioned, he shall produce to the court or master (as the case may be) an extract, certified as hereinbefore mentioned, accompanied by an affidavit stating the deponent's belief that the entry or entries in the original register or record is correct and genuine (a)."

Certified Extract to be used in Interlocutory Proceedings, and in the Master's Office.

[Sect. 16. "That in case any party shall intend to use in evidence in any ecclesiastical court, or in the High Court of Admiralty, any extract, certified as hereinbefore mentioned, he shall plead and prove the same in the same manner to all intents and purposes as if the same were an extract from a parish register, save and except

Certified Extract to be used in Ecclesiastical Courts;

(a) [See title Practice, SPECIAL PART, "Evidence."]

3 & 4 Vict.
c. 92.

and the
Judge
may order
the Produc-
tion of the
Original.

In Criminal
Cases the
Originals to
be produced.

Rules to be
made to re-
gulate the
Practice as to
Admission of
Registers.

Who shall
make such
Rules.

Fleet and
May Fair
Registers,
&c.

that any such extract, certified as hereinbefore mentioned, shall be pleaded and received in proof without its being necessary to prove the collation of such extract with the original register or record: Provided always, that the judge of the court, on cause shown by any party to the suit (or of his own motion when the proceedings are *in poenam*), may, after publication, issue a monition for the production at the hearing of the cause of the original register or record containing the entry to which such certified extract relates."

[Sect. 17. "That in all criminal cases in which it shall be necessary to use in evidence any entry or entries contained in any of the said registers or records, such evidence shall be given by producing to the court the original register or record."

[Sect. 18. "That at any time within three years from the passing of this act such rules may be made, by the authority hereinafter specified, for regulating the mode of reception of the said registers or records, or certified extracts therefrom, in evidence in the courts hereinafter mentioned, and for regulating the notice hereinbefore directed to be given, and the costs of producing such registers or records or extracts, as shall seem expedient, which rules, orders, and regulations shall be laid before both houses of parliament, and shall take effect within six weeks after the same shall have been so laid before parliament, and shall thereupon be binding and obligatory upon the said courts respectively, and be of the like force and effect as if the provisions contained therein had been herein expressly enacted."

[Sect. 19. "That such rules shall be made for the High Court of Chancery by the Lord High Chancellor and the Master of the Rolls, and for the Courts of Queen's Bench, Common Pleas, and Exchequer, by eight or more judges of the last-mentioned courts, of whom the chiefs of each of the last-mentioned courts shall be three, and for the High Court of Admiralty by the judge of the Court of Admiralty, and for the ecclesiastical courts in England and Wales by the official principal of the Court of Arches, with the chancellor of the diocese of London, or with the commissary of the diocese of Canterbury."

[Sect. 20. "That the several registers and records of baptisms and marriages performed at the Fleet and King's Bench Prisons, at May Fair, and at the Mint in Southwark, and elsewhere, which were deposited in the registry of the Bishop of London in the year one thousand eight hundred and twenty-one, by the authority of one of his late majesty's principal secretaries of state, shall be transferred from the said registry to the custody of the registrar general, who is hereby directed to receive the same for safe custody: Provided nevertheless, that none of the provisions hereinbefore contained respecting the registers and records made receivable in evidence by virtue of this act shall extend to the registers and records so deposited in the registry of the Bishop of London in the year one thousand eight hundred and twenty-one as aforesaid."

[It has been seen that the second section of this statute provided for the continuance of the commission for twelve months longer, for the purpose of certifying to one of the secretaries of state and the registrar general such records as they might consider authentic. On the 9th of August, 1841, the commissioners made their final report.—ED.]

Repair of the Church—See **Church**.

Request, Letters of—See **Practice**.

Residence. (a)

I. <i>Residence of Incumbents before 1 & 2 Vict. c. 106</i> . . . 477	III. <i>Residence of Bishops</i> . . . 510
II. <i>Residence of Incumbents since 1 & 2 Vict. c. 106</i> . . . 489	IV. <i>Residence of Deans and Canons</i> 511

I. Residence of Incumbents before 1 & 2 Vict. c. 106.

1. <i>By Canon Law</i> 477	4. <i>Leases of Non-Residents</i> . . . 485
2. <i>By Statute Law</i> 478	5. <i>Excuses for Non-Residence</i> . 485
3. <i>Privileged Persons</i> . . . 478	

[THE ancient law of the Church upon this important subject, and its restoration by the Council of Trent, are thus emphatically stated by Van Espen (b): “Nihil adeo vocationi clericali oppositum, nihil ecclesiæ magis probrosum et laicis scandalosum esse quam otiosam ac inertem clericorum vitam ratione et experientiâ compertum est. Hinc jam pridem sollicita fuit ecclesia ne quis in clerum assumeretur nisi certo loco ascriberetur, ubi functionibus ordini suo convenientibus occuparetur et vitam clerico dignam institueret. Disciplinam hanc canone sexto Concilii Chalcedonensis probatam sed temporum injuriâ penè collapsam, restauratam volens *Synodus Tridentina inhærendo vestigiis dicti concilii* statuit ut nullus in posterum ordinatur qui illi ecclesiæ aut pio loco pro cujus necessitate aut validitate assumitur non adscribatur ubi suis fungitur muneribus nec incertis vagetur sedibus.” Sess. 23, cap. 16, De Resid.—ED.]

1. Otho. “The bishop shall provide, that in every church there shall be one resident, who shall take care of the cure of souls, and exercise himself profitably and honestly in performing divine service and administration of the sacraments (c).”

Residence by Canon.

The rule of the ancient canon law was, that if a clergyman deserted his church or prebend without just and necessary cause, and especially without the consent of the diocesan, he should be deprived. And agreeably hereunto was the practice in this realm; for though sometimes the bishop proceeded only to sequestration or other censures of an inferior nature, yet the more frequent punishment was deprivation (d).

(a) [See title **Plurality**.]

(c) Athon, 36.

(b) [Van Espen, *Jus Canon.* pt. i.

(d) Gibs. 827.

t. 11, De Personis.—ED.]

Residence by
the Common
Law.

Regularly, personal residence is required of ecclesiastical persons upon their cures; and to that end, by the common law, if he that hath a benefice with cure be chosen to an office of bailiff, or beadle, or the like secular office, he may have the king's writ for his discharge (*e*).

For the intendment of the common law is, that a clerk is resident upon his cure; insomuch that in an action of debt brought against J. S., rector of D., the defendant pleading that he was demurrant and conversant at B. in another county, the plea was overruled; for since the defendant denied not that he was rector of the church of D., he shall be deemed by law to be demurrant and conversant there for the cure of souls (*f*).

Residence by
Statute.

[2. The 1 & 2 Vict., c. 106, has superseded the 57 Geo. 3, c. 99, as well as all the various statutes enumerated in and partially destroyed by the preamble of that act (*g*).

[The mode of proceeding under this act to enforce residence has been stated at length under the title of *Privileges and Restraints of the Clergy*.—ED.]

Privileged
Persons.

3. By the statute of the *Articuli Cleri*, 9 Edw. 2, st. 1, c. 8, in the articles exhibited by the clergy, one is as follows: "Also barons of the king's exchequer, claiming by their privilege that they ought to make answer to no complainant out of the same place, do extend the same privilege unto clerks abiding there, called to orders or unto residence, and inhibit ordinaries that by no means or for any cause, so long as they be in the exchequer, or in the king's service, they shall not call them to judgment." Unto which it is answered, "It pleaseth our lord the king, that such clerks as attend in his service, if they offend, shall be correct by their ordinaries, like as other; but so long as they are occupied about the exchequer, they shall not be bound to keep residence in their churches: And this is added of new by the king's council: The king and his ancestors, since time out of mind, have used that clerks which are employed in his service, during such time as they are in service, shall not be compelled to keep residence at their benefices; and such things as be thought necessary for the king and commonwealth, ought not to be said to be prejudicial to the liberty of the church."

If they offend.—This extendeth only to offences or crimes, whereof the Ecclesiastical Court hath cognizance, as heresy, adultery, and the like, which the ordinary may correct; and not unto civil actions (*h*).

Added of new by the King's Council.—By this is meant the parliament, or common council of the realm, as it is termed in original writs, and in other legal records, and so it is taken in other acts of parliament, and in the preamble of this act also (*i*).

(*e*) 2 Inst. 625.

(*f*) Ibid.

(*g*) [See this statute, *post*.]

(*h*) 2 Inst. 624.

(*i*) Ibid.

That Clerks which are employed in his Service.—This is general, and not limited (as the former is) to the privilege of the exchequer, but extendeth to any other service for the king and commonwealth; as if he be employed as an ambassador into any foreign nation, or the like service of the king, which is for the public, which ever must be preferred before the private (j).

The King and his Ancestors since time out of mind have used.—The clergy in this parliament inveighing vehemently against this answer, and that it tended to the breach of the ecclesiastical liberty, which was granted to them by Magna Charta, and often confirmed by other acts of parliament, that *the Church of England shall be free*; to this it was answered, that the words subsequent in the Magna Charta explained these words, *and shall have all her whole rights and liberties inviolable*; so as the clergy cannot claim any right but *jus suum*, nor any liberty but *libertates suas* (as the words are): and the point here in question, viz. to proceed against a clerk for non-residence, whilst he was in the king's service for the commonwealth, was neither *jus suum*, nor *libertas sua*, but *libertas regis*. And therefore the parliament thought it fit to declare, that the king and his ancestors had used this liberty or prerogative time out of mind: and where it was said, that this tended to the prejudice of the liberty of the church, the parliament thereto answered (which is worthy, Lord Coke says, to be written in letters of gold), *Such things as be thought necessary for the king and commonwealth, ought not to be said to be prejudicial to the liberty of the church* (k).

[The 21 Hen. 8, c. 13, commonly called the Statute of Non-Residence, was repealed by 57 Geo. 3, c. 99 (l), but the following provisions were preserved by sect. 80 of that act:—ED.]

21 Hen. 8,
c. 13, how far
unrepealed.

Sect. 29. "Provided also, that it shall be lawful to the king to give licence to every of his own chaplains for non-residence upon their benefices; any thing in this act to the contrary notwithstanding."

Sect. 33. "Provided also, that every dutchess, marquess, countess, baroness, widows, which shall take any husbands under the degree of a baron, may take such number of chaplains as they might have done being widows; and that every such chaplain may have like liberty of non-residence, as they might have had if their said ladies and mistresses had kept themselves widows."

It shall be lawful to the King to give Licence to every of his own Chaplains for Non-residence (m).—In the former part of the act it was expressed that the several chaplains therein mentioned might be dispensed withal for their non-residence during such time only as they should be and remain

(j) 2 Inst. 624.

(k) Ibid.

(l) [Afterwards repealed by 1 & 2 Vict. c. 106.]

(m) [Sect. 29.]

in the household of those who retained them: but this clause seemeth to contain one exception to that limitation with regard to the chaplains of the king, who may (as it seemeth) by this clause give licence to any of his own chaplains for non-residence generally, and not only during the time of their attendance in the household: and this proviso seemeth only to be a saving of the king's right which he had before, as is set forth in the answer to one of the *Articuli Cleri* before mentioned, and in the comment thereupon.

Shall take any Husbands under the Degree of a Baron (k).]

—If any of these retaineth chaplains according to this statute, and afterwards taketh to husband one of the nobility (as it was in *Acton's case*, where the Baroness Mounteagle, after such retainer, took to husband the Lord Compton), the retainer remaineth in force notwithstanding such marriage, and the chaplains, so long as they tend upon her, shall not be adjudged non-residents within this act (*l*).

25 Hen. 8,
c. 16.

By the 25 Hen. 8, c. 16, "Whereas by the statute of the 21 Hen. 8, c. 13, it was ordained, that certain honorable persons, as well spiritual as temporal, shall have chaplains beneficed with cure to serve them in their honorable houses, which chaplains shall not incur the danger of any penalty or forfeiture made or declared in the same parliament, for non-residence upon their said benefices; in which act no provision was made for any of the king's judges of his high courts, commonly called the King's Bench and the Common Pleas, except only for the chief judge of the King's Bench, nor for the chancellor nor the chief baron of the King's Exchequer, nor for any other inferior persons being of the king's most honorable council: it is therefore enacted, that as well every judge of the said high courts, and the chancellor and chief baron of the Exchequer, the king's general attorney and general solicitor for the time that shall be, shall and may retain and have in his house or attendant to his person, one chaplain having one benefice with cure of souls, *which may be absent from his said benefice, and not resident upon the same*; the said statute made in the said one and twentieth year, or any other statute, act or ordinance to the contrary notwithstanding."

28 Hen. 8,
c. 13.

By the 28 Hen. 8, c. 13, "Whereas divers persons under

(*k*) [Sect. 28.]

(*l*) 4 Co. 117. [It may be useful to preserve the authorities, both judicial and from text writers, cited in the edition of Dr. Burn (published before the enactment of 57 Geo. 3), upon the legal construction of this statute of Henry the Eighth. They were as follows: as to the meaning of "dignity," Gibson's Codex, 886; *Boughton v. Gousley*, Cro. Eliz. 663: of "benefice," 4 T. R. 665: of "personal residence, &c." *Sands v. Pinner*, Cro.

Eliz. 898; Gibs. 886; 13 Eliz. c. 20; 2 Brownl. 54; Lord Mansfield's decision in *Low v. Ibbetson*, Burrow, 2722; *Wilkinson v. Clerk*, ib.; *Garland v. Burton*, Str. 1103; *Leigh v. Kent*, 3 T. R. 362; Bull. N. P. 196: of "procuring dispensation at Rome or elsewhere," Gibs. 887: of "chaplains to any of the spiritual or temporal lords of parliament," Bishop Sherlock's Charge in the year 1759, p. 9.—Ed.]

colour of the proviso in the act of the 21 Hen. 8, c. 13, which exempteth persons conversant in the universities for study, from the penalty of non-residence contained in the said act, do resort to the universities, where under pretence of study they live dissolutely, nothing profiting themselves by study at all, but consume the time in idleness and other pastimes: it is enacted, that all persons who shall be to any benefice or benefices promoted as is aforesaid, being above the age of forty years (the chancellor, vice-chancellor, commissary of the said universities, wardens, deans, provosts, presidents, rectors, masters, principals and other head rulers of colleges, halls and other houses or places corporate within the said universities, doctors of the chair, readers of divinity in the common schools of divinity in the said universities only excepted), shall be resident and abiding at and upon one of the said benefices, according to the intent and true meaning of the said former act, upon such pains and penalties as be contained in the said former act, made and appointed for such beneficed persons for their non-residence; and that none of the said beneficed persons, being above the age aforesaid, except before except, *shall be excused of their non-residence* upon the said benefices, for that they be students or resiants within the said universities; any proviso or any other clause or sentence contained in the said former act of non-residence, or any other thing to the contrary in any wise notwithstanding.

“And further, that all and singular such beneficed persons, being under the age of forty years, resiant and abiding within the said universities, shall not enjoy the *privilege and liberty of non-residence* contained in the proviso of the said former act, unless he or they be present at the ordinary lecture and lectures, as well at home in their houses as in the common school or schools, and in their proper person, keep sophisms, problems, disputations and other exercises of learning, and be opponent and respondent in the same, according to the ordinance and statutes of the said universities; any thing contained in the said proviso or former act to the contrary notwithstanding.

“Provided always, that nothing in this act shall extend to any person who shall be reader of any public or common lecture in divinity, law civil, physic, philosophy, humanity, or any of the liberal sciences, or public or common interpreter or teacher of the Hebrew tongue, Chaldee or Greek; nor to any persons above the age of forty years, who shall resort to any of the said universities to proceed doctors in divinity, law civil, or physic, for the time of their said proceedings, and executing of such sermons, disputations or lectures, which they be bound by the statutes of the universities there to do for the said degrees so obtained.”

By the 33 Hen. 8, c. 28, "Whereas by the act of the 21 Hen. 8, c. 13, it was ordained, that certain honorable persons and other of the king's counsellors and officers, as well spiritual as temporal, should and might have chaplains beneficed with cure, to serve and attend upon them in their houses, which chaplains shall not incur the danger of any penalty or forfeiture made or declared in the said act for non-residence upon their said benefices; in which act no provision is made for any of the head officers of the king's courts of the duchy of Lancaster, the courts of augmentations of the revenues of the crown, the first-fruits and tenths, the master of his majesty's wards and liveries, the general surveyors of his lands, and other his majesty's courts: it is therefore enacted, that the chancellor of the said court of the duchy of Lancaster, the chancellor of the court of augmentations, the chancellor of the court of first-fruits and tenths, the master of his majesty's wards and liveries, and every of the king's general surveyors of his lands, the treasurer of his chamber, and the groom of the stole, and every of them, shall and may retain in his house, or attendant unto his person, one chaplain having one benefice with cure of souls, *which may be absent from the said benefice and non-resident upon the same*; the said statute made in the said twenty-first year of his majesty's reign, or any other statute, act or ordinance to the contrary notwithstanding.

"Provided always that every of the said chaplains so being beneficed as aforesaid, and dwelling with any the officers aforesaid, shall repair twice a year at the least to his said benefice and cure, and there abide for eight days at every such time at the least, to visit and instruct his said cure, on pain of 40s. for every time so failing, half to the king and half to him that will sue for the same in any of the king's courts of record, in which suit no essoin, protection or wager of law shall be allowed. [These acts are not enumerated among the statutes repealed by section 1 of 57 Geo. 3, c. 99.—Ed.]

How far Statutes supersede the Canon Law.

And here the question comes to be reconsidered, how far these statutes, taken together, do supersede the canon law, so as to take away the power which the ordinary had before, of enjoining residence to the clergy of his diocese. It seems to be clear, that before these statutes the bishops of this realm had and exercised a power of calling their clergy to residence, but more frequently they did not exert this power which so far forth was to the clergy a virtual dispensation for non-residence. But this not exerting of their power was in them not always voluntary; for they were under the controlling influence of the pope, who granted dispensations of non-residence to as many as would purchase them, and disposed of abundance of ecclesiastical preferments to foreigners who never resided here at all. The king also, as appears, had a power to require the service of clergymen, and consequently in such

case to dispense with them for non-residence upon their benefices. This power of the king is reserved to him by the aforesaid act of the 21 Hen. 8, c. 13. But it is the power of dispensation in the two former cases which is intended to be taken away, namely, by the bishop and by the pope; and by the said act residence is enjoined to the clergy under the penalty therein mentioned, notwithstanding any dispensation to the contrary from the court of Rome or elsewhere; with a proviso nevertheless that the said act shall not extend nor be prejudicial to the chaplains and others therein specially excepted. It is argued, that this act being made to rectify what had been insufficient or ineffectual in the canon law, and inflicting a temporal penalty to enforce the obligation of residence, the parliament intended that the said act should be from thenceforth, if not the sole, yet the principal rule of proceeding in this particular; and consequently that the persons excepted in the act need no other exemption than what is given to them by the act of their non-residence. Unto this it is answered, that the intention of the act was not to take away any power which the bishop had of enjoining residence, but the contrary, namely, it was to take away that power which the bishop or pope exercised of granting dispensations for non-residence, that is to say, the act left to them that power which was beneficial and only took from them that which tended to the detriment of the church; and consequently that the bishop may enjoin residence to the clergy as he might before, only he may not dispense with them as he did before for non-residence. And indeed, from any thing that appears upon the face of the act, the contrary supposition seemeth to bear somewhat hard against the rule which hath generally been adhered to in the construction of acts of parliament, that an act of parliament in the affirmative doth not take away the ecclesiastical jurisdiction, and that the same shall not be taken away in any act of parliament, but by express words. It is therefore further urged, that the three subsequent acts do explain this act, and by the express words thereof do establish the foregoing interpretation. In the first of the three it is said, that the persons therein mentioned may retain one chaplain *which may be absent from his benefice and not resident upon the same*; in the second it is said, that persons above forty years of age residing in the universities *shall not be excused of their non-residence*, and again that persons under forty years of age *shall not enjoy the privilege of non-residence contained in the proviso of the said former act*, unless they perform the common exercises there, and the like, which implies that if they do this they shall enjoy such privilege; and in the third it is said, that the persons therein mentioned may retain one chaplain *which may be absent from his benefice and non-resident upon the same*; and it is not to be supposed that the parliament intended a

How far Statutes supersede the Canon Law.

greater privilege to the chaplains of the inferior officers mentioned in the said last act, than to the chaplains of the royal family and principal nobility mentioned in the first act. Unto this the most apposite answer seemeth to be, that it is not expressed absolutely in any of the said three acts, that the chaplains or others therein mentioned shall enjoy the privilege of non-residence, or may be absent from their benefices, and not resident upon the same; but only this, that they may be absent or non-resident as aforesaid, *the said statute made in the said twenty-first year, or any other statute or ordinance to the contrary notwithstanding*. So that they are only exempted thereby from the restraints introduced by the statute law; but in other respects are left as they were before. But concerning this, although it is a case likely enough to happen every day, there hath been no adjudication.

Hospitality to
be kept by
Non Resi-
dents.

Peccham. "We do decree, that rectors who do not make personal residence in their churches, and who have no vicars, shall exhibit the grace of hospitality by their stewards according to the ability of the church, so that at least the extreme necessity of the poor parishioners be relieved; and they who come there, and in their passage preach the word of God, may receive necessary sustenance, that the churches be not justly forsaken of the preachers through the violence of want, for the workman is worthy of his meat, and no man is obliged to warfare at his own cost."

Who do not make Personal Residence.—That is, although they be licensed to non-residence by their bishops or others to whom it appertaineth. For if they be non-resident without licence, they are not only bound to the observance of this constitution, but otherwise may be proceeded against according to law (m).

And who have no Vicars.—This intimates that they who have vicars in their benefices, are excused from personal residence; and this may be well admitted, where the parish church is annexed to a prebend or dignity, for then the principal is excused by the vicar from personal residence, and the reason is, because he is bound to reside in his greater benefice. But this reason (said Lindwood) doth not hold where in a church there is a rector and vicar, which church doth not depend on any other church, wherefore he who hath such church is not excused from residence by the vicar which he hath there; nor doth it make against this, if it be alleged, that such rector hath not the cure of souls, but the vicar; for habitually, and in propriety, the cure of souls is in the principal rector; and in the vicar only, as to the exercise and effect thereof (n).

Who come there, and in their passage preach the Word of God.—This constitution was made by Peccham, in favour of

(m) Lind. 132.

(n) Ibid.

his own brethren, the friars, who travelled under the pretence of preaching. Lindwood here bears hard upon them for sauntering up and down in the parishes where they preached, and begging the people's alms after they had received what was sufficient at the parsonage house (*o*).

Preach the word of God.]—That is, if they be licensed and lawfully sent to preach (*p*). [See title *Public Worship*.]

[4. The 13 Eliz. c. 20 (*q*), avoided leases of ecclesiastical property by the non-residence of the incumbent for eighty days in one year. The 43 Geo. 3, c. 84, repealed this statute, and although a portion of it was revived by the 57 Geo. 3, c. 84, which repealed the 43 Geo. 3, this portion of it was not revived.

Leases of
Non-Resi-
dents.

[5. As the act of 1 & 2 Vict. c. 106, is not retrospective in its operation, it may be well to mention some of the excuses for non-residence which were held to exempt the party alleging them from the penalties imposed by the 10th section of 57 Geo. 3:—Total want of health has been held a sufficient excuse for an absence of twenty years (*r*), but the want of a parsonage-house did not excuse the incumbent's residing out of the parish (*s*), nor a sequestration upon a *fieri facias* of a benefice with cure (*t*). The non-residence on one benefice under a licence from the diocesan thereof was held not equivalent to actual residence thereon, so as to excuse the incumbent's non-residence on another benefice: therefore a bishop's retrospective certificate that he would have granted a licence for non-residence because the incumbent was performing the duties of another benefice, within two miles of which he lived by licence from another diocesan, not being allowed by the archbishop, was void, but good with the archbishop's certificate, though granted after 1st July, 1814 (*u*). If a clergyman who had two livings resides within one of the parishes wherein there is no house of residence, it was a sufficient residence there to exempt him without licence from the bishop from penalties for not residing on the other benefice (*x*). A private statute annexed the rectory of H. to the deanery of Windsor, and recited that the necessary residence on the deanery, and the dean's attendance on her Majesty as registrar of the Order of the Garter, would oblige him to be often absent from H., and the statute compelled him to appoint a stipendiary curate constantly resident at H.; and it appeared that this, without more, conferred an excuse for

Excuses for
Non-Resi-
dence before
1 & 2 Vict.
c. 106, and
under 57 Geo.
3, s. 10.

(*o*) Johns. Pecch.; Lind. 133.

(*p*) Ibid.

(*q*) [The following cases refer to actions brought under this act:—*Doe d. Crisp v. Barber*, 2 T. R. 749; *S. P. Doe d. Rogers v. Mears*, Cowp. 129; Lofft, 602; *Frogmorton d. Fleming v. Scott*, 2 East, 467; *Graham v. Peat*, 1 East, 244.—Ed.]

(*r*) [*Scammell v. Willett*, 3 Esp. 29, per J. Buller.]

(*s*) [*Wilkinson (qui tam action) v. Allott*, Cowp. 429.]

(*t*) [*Doe d. Rogers v. Mears*, Cowp. 129; Lofft, 602.]

(*u*) [*Wright v. Flamark*, 6 Taunt. 52; 1 Marsh. 368.]

(*x*) [*Wynn v. Smithies*, 6 Taunt. 198; 1 Marsh. 549.]

non-residence at H., although in the subsequent act of 43 Geo. 3, c. 84, imposing residence on all benefices not therein excepted, this is not enumerated as a ground of exemption or of licence (*y*). It seems to be doubtful whether a clergyman is wilfully absent from his benefice during the time he is in custody for debt, under an arrest made while he is residing out of his parish (*z*).

Licence for
Non-Resi-
dence.

[It was no ground under stat. 43 Geo. 3, c. 84, s. 19, for a licence of non-residence upon a benefice in one diocese, that a bishop of another diocese had licensed the incumbent's non-residence on a benefice within that diocese, because he had no house on that benefice, and lived within two miles thereof and did the duty, and a licence granted on that ground would not be valid without the allowance of the archbishop (*a*). No licence is necessary for non-residence in the parsonage-house of a parish wherein there is no such house (*b*). Where a licence for non-residence had been obtained previously to the 14th of July, 1814, pursuant to 54 Geo. 3, c. 54, but the allowance by the archbishop required by 43 Geo. 3, c. 84, s. 20, had not been obtained till after that period, the licence, when ratified, is valid from the time when it was originally granted (*c*). A licence of non-residence on a benefice within an archbishop's peculiar locally situated in another diocese, need not be registered in the registry of the diocese, but ought to be registered in the registry of the archbishop (*d*). A licence to an incumbent to absent himself from a living may be revoked under peculiar circumstances (*e*).—ED.]

Of Rectors
and Vicars.

There doth not appear to be any difference, either by the ecclesiastical or temporal laws of this kingdom, between the case of a rector and of a vicar concerning residence, except only that the vicar is sworn to reside (with a proviso, unless he shall be otherwise dispensed withal by his diocesan), and the rector is not sworn. And the reason of this difference was this: In the Council of Lateran held under Alexander III., and in another Lateran Council held under Innocent III., there were very strict canons made against pluralities; by the first of these councils pluralities are restrained, and every person admitted *ad ecclesiam, vel ecclesiasticum ministerium*, is bound to reside there, and personally serve the cure; by the second of these councils, if any person, having one benefice with cure of souls, accepts of a second, his first is declared void *ipso jure*. These canons were received in England, and are still part of our ecclesiastical law.

(*y*) [*Wright v. Legge*, 6 Taunt. 198; 1 Marsh. 549.]

(*z*) [*Vaux v. Vollans*, 1 Nev. & M. 392; 5 Taunt. 807; see also *Wynn v. Kay*, 1 Marsh. 387; 6 Taunt. 48.]

(*a*) [See sect. 20; 6 Taunt. 52; 1 Marsh. 368.]

(*b*) [*Wynn v. Smithies*, 6 Taunt. 757.]

(*c*) [*Wright v. Lamb*, 1 Marsh. 392; 5 Taunt. 807; see also *Wynn v. Kay*, 1 Marsh. 387; 6 Taunt. 48.]

(*d*) [*Wynn v. Moore*, 5 Taunt. 757.]

(*e*) [*Bagshaw v. Bopley*, 4 T. R. 78.]

At the first appearance of these canons, there was no doubt made but they obliged all *rectors*; for they, according to the language of the law, had churches *in title*, and had *beneficium ecclesiasticum*: and of such the canons spoke. But *vicars* did not then look upon themselves to be bound by these canons, for they, as the gloss upon the Decretals speaks, had not *ecclesiam quoad titulum*; and the text of the law describes them not as *having benefices*, but as bound *personis et ecclesiis deservire*, that is, as assistant to the rector in his church.

Of Rectors
and Vicars.

Upon this notion a practice was founded, and prevailed in England, which eluded the canons made against pluralities. A man beneficed in one church could not accept another without avoiding the first; but a man possessed of a benefice could accept a vicarage under the rector in another church, for that was no benefice in law, and therefore not within the letter of the canon, which forbids any man holding two benefices.

The way then of taking a second benefice in fraud of the canon was this: A friend was presented, who took the institution, and had the church *quoad titulum*; as soon as he was possessed, he constituted the person vicar for whose benefit he took the living, and by consent of the diocesan allotted the whole profit of the living for the vicar's portion, except a small matter reserved to himself.

This vicar went and resided upon his first living, for the canon reached him where he had the *benefice*; but having no benefice where he had only a vicarage, he thought himself secure against the said canons requiring residence.

This piece of management gave occasion to several papal decrees, and to the following constitution of Archbishop Langton, viz. "No ordinary shall admit any one to a vicarage who will not personally officiate there (*f*)."

And to another constitution of the same archbishop, by which it is enjoined, that "vicars who will be non-resident shall be deprived (*g*)."

But the abuse still continued, and therefore Otho, in his legatine constitutions, applied a stronger remedy, ordaining that "none shall be admitted to a vicarage, but who renouncing all other benefices (if he hath any) with cure of souls, shall swear that he will make residence there, and shall constantly so reside: otherwise his institution shall be null, and the vicarage shall be given to another (*h*)."

And it is upon the authority of this constitution that the oath of residence is administered to vicars to this day. And this obligation of vicars to residence was further enforced by a constitution of Othobon, as followeth: "If any shall detain a vicarage contrary to the aforesaid constitution of Otho, he shall not appropriate to himself the profits thereof, but shall restore the same; one moiety whereof shall be applied to the use of

(*f*) Lind. 64.

(*g*) Lind. 131.

(*h*) Athon, 24.

Of Rectors
and Vicars.

that church, and the other moiety shall be distributed half to the poor of the parish and half to the archdeacon. And the archdeacon shall make diligent inquiry every year, and cause this constitution to be strictly observed. And if he shall find that any one detaineth a vicarage contrary to the premises, he shall forthwith notify to the ordinary that such vicarage is vacant, who shall do what to him belongeth in the premises; and if the ordinary shall delay to institute another into such vicarage, he shall be suspended from collation, institution, or presentation to any benefices until he shall comply. And if any one shall strive to detain a vicarage contrary to the premises, and persist in his obstinacy for a month, he shall, besides the penalties aforesaid, be *ipso facto* deprived of his other benefices (if he have any); and shall be disabled for ever to hold such vicarage which he hath so vexatiously detained, and from obtaining any other benefice for three years. And if the archdeacon shall be remiss in the premises, he shall be deprived of the share of the aforesaid penalty assigned to him, and be suspended from the entrance of the church until he shall perform his duty (*i*)."

So that, upon the whole, the doubt was not, whether rectors were obliged to residence; the only question was whether vicars were also obliged; and to enforce the residence of vicars, in like manner as of rectors, the aforesaid constitutions were ordained (*k*).

[But by sect. 61 of 1 & 2 Vict. c. 106, this oath is abolished. "That no oath shall be required of or taken by any vicar in relation to residence on his vicarage; any law, custom, constitution, or usage to the contrary notwithstanding."—ED.]

Of Curates.

Can. 47. "Every beneficed man licensed by the laws of this realm, upon urgent occasions of other service, not to reside upon his benefice, shall cause his cure to be supplied by a curate that is a sufficient and licensed preacher, if the worth of the benefice will bear it. But whosoever hath two benefices shall maintain a preacher licensed in the benefice where he doth not reside, except he preach himself at both of them usually."

And by the last article of Archbishop Wake's directions (which are inserted at large under the title **Ordination**), it is required that the bishop shall take care, as much as possible, that whosoever is admitted to serve any cure, do reside in the parish where he is to serve; especially in livings that are able to support a resident cure: and where that cannot be done, that they do at least reside so near to the place that they may conveniently perform all their duties both in the church and parish. [See provisions of 1 & 2 Vict. c. 106, on this subject below.—ED.]

Of Pluralists.

By the old faculty of dispensation, a pluralist was required,

(*i*) Athon, 95.

(*k*) Sherl. *ibid.* pp. 20, 21, 22.

in that benefice from which he shall happen to be most absent, to preach thirteen sermons every year; and to exercise hospitality for two months yearly, and for that time, according to the fruits and profits thereof, as much as in him lieth, to support and relieve the inhabitants of that parish, especially the poor and needy. [See title *Plurality*.]

By the 1 Will. 3, c. 26, "if any person presented or nominated by either of the universities to a popish benefice with cure, shall be absent from the same above the space of sixty days in any one year, in such case the said benefice shall become void (l)." [See title *Colleges and Universities*.]

Of Persons
presented by
the Universi-
ties to Popish
Livings.

[II. *Residence of Incumbents since 1 & 2 Vict. c. 106.*

1. <i>Extent and Nature of the Act</i> 489	5. <i>Return to her Majesty in Council</i> 499
2. <i>Penalties for Non-Residence</i> . 490	6. <i>Curates of Non-Residents</i> . 499
3. <i>Licences for Non-Residence</i> . 493	7. <i>How Patrons and Crown are affected by this Act</i> . . . 508
4. <i>Questions to be put by Bishop to Incumbent</i> 497	8. <i>Fees for Licences</i> 509

[1. *Extent and Nature of the Act.*

[This statute, passed on the 14th of August, 1838, has repealed the 21 Hen. 8, c. 13, and 57 Geo. 3, c. 99, but, as has been said, is not retrospective in its operation. By sect. 132 it provides

["That nothing in this act contained shall be deemed, construed, or taken to derogate from, diminish, prejudice, alter, or affect, otherwise than is expressly provided, any powers, authorities, rights, or jurisdiction already vested in or belonging to any archbishop or bishop under or by virtue of any statute, canon, usage, or otherwise howsoever."

[And by sect. 107,

["That all the powers, authorities, provisions, regulations, matters, and things in this act contained, in relation to bishops in their dioceses, shall extend and be construed to extend to the archbishops in the respective dioceses of which they are bishops, and also in their own peculiar jurisdictions, as fully and effectually as if the archbishops were named with the bishops in every such case."

[And by sect. 133,

["That no provision in this act contained shall extend or be

(l) [Some of the leading cases of actions at common law for non-residence are—*Whitehead v. Wynn*, 5 M. & S. 427; 2 Chit. 420; *Bevan (quintam) v. Williams*, 3 T. R. 635; *Still v. Coleridge*, Forrest, 117; *Cathcart v. Hardy* (in error), 2 M. & S. 534; but compare this with S. C. 5 Taunt. 2.

[For the practice of the common law courts on this action, see *Wright v. Legge*, 6 Taunt. 48; *Vaux v. Volans*, 4 B. & Ad. 525; 1 Nev. & M. 307; *Balls v. Attwood*, 1 H. Bl. 546; *Leigh v. Kent*, 3 T. R. 362; *Wright v. Lloyd*, 5 Taunt. 304; *Wright v. Whalley*, 5 Taunt. 305; *Wynn v. Budd*, 5 Taunt. 629.—Ed.]

construed to extend to that part of the United Kingdom called Ireland."

[The mode of enforcing the penalties and punishments imposed by this act will be found under the title *Privileges and Restraints of the Clergy*; the clauses which contain regulations on the subject of pluralities will be found under the title *Plurality*; and the remaining sections of the act under the titles *Colleges, Leases, Peculiar, Vacation, Union, Wales*.

[2. *Penalties for Non-Residence.*

Penalties for Non-residence on Incumbent not having a Licence or Exemption, unless he be resident on another Benefice.

[Sect. 32. "Be it enacted, that every spiritual person holding any benefice shall keep residence on his benefice, and in the house of residence (if any) belonging thereto; and if any such person shall, without any such licence or exemption as is in this act allowed for that purpose, or unless he shall be resident at some other benefice of which he may be possessed, absent himself from such benefice, or from such house of residence, if any, for any period exceeding the space of three months together, or to be accounted at several times in any one year, he shall, when such absence shall exceed three months and not exceed six months, forfeit one-third part of the annual value of the benefice from which he shall so absent himself; and when such absence shall exceed six months and not exceed eight months, one-half part of such annual value; and when such absence shall exceed eight months, two-third parts of such annual value; and when such absence shall have been for the whole of the year, three-fourth parts of such annual value."

Licence to reside out of the usual House, if unfit.

[Sect. 33. "That it shall be lawful for any bishop, upon application in writing by any spiritual person holding any benefice within his diocese whereon there shall be no house or no fit house of residence, by licence under his hand and seal, to be registered in the registry of the diocese, which the registrar is hereby required to do, to permit such person to reside in some fit and convenient house, although not belonging to such benefice, such house to be particularly described and specified in such licence, and for a certain time to be therein also specified, not exceeding the period by this act limited, and from time to time, as such bishop may think fit, to renew such licence; and every such house shall be a legal house of residence for such specified time to all intents and purposes: Provided always, that no such licence shall be granted to such spiritual person to reside in any house unless it be within three miles of the church or chapel of such benefice; nor in case such church or chapel be in any city, or market or borough town, unless such house be within two miles of such church or chapel."

Houses purchased by Governors of Queen Anne's Bounty to be deemed Residences.

[Sect. 34. "And whereas the governors of the bounty of Queen Anne have purchased, built, or procured, and may hereafter purchase, build, or procure, by way of benefaction or donation to poor benefices, houses not situate within the parishes or places wherein such benefices lie, but so near thereto as to be sufficiently convenient and suitable for the residence of the officiating ministers thereof;

be it therefore enacted, that such houses, having been previously approved by the bishop of the diocese, by writing under his hand and seal duly registered in the registry of the diocese, shall be deemed the houses of residence belonging to such benefices to all intents and purposes whatsoever."

1 & 2 Vict.
c. 106.
*Penalties for
Non-Resi-
dence.*

[Sect. 35. "That in all cases of rectories having vicarages endowed or perpetual curacies the residence of the vicar or perpetual curate in the rectory house of such benefice shall be deemed a legal residence to all intents and purposes whatever; provided that the house belonging to the vicarage or perpetual curacy be kept in proper repair to the satisfaction of the bishop of the diocese."

Vicar or Per-
petual Curate
may reside
in Rectory
House.

[The 36th section enacts that the widow of any spiritual person may continue in the house of residence for two months after his decease. See *Privileges and Restraints of the Clergy*.

[Sect. 37. "That no spiritual person, being head ruler of any college or hall within either of the universities of Oxford or Cambridge, or being warden of the university of Durham, or being head master of Eton, Winchester, or Westminster school, or principal or any professor of the East India College, having been appointed such principal or professor before the time of the passing of this act, and not having respectively more than one benefice with cure of souls, shall be liable to any of the penalties or forfeitures in this act contained for or on account of non-residence on any benefice."

Certain Per-
sons exempt
from Penal-
ties for Non-
residence.

[Sect. 38. "That no spiritual person being dean of any cathedral or collegiate church, during such time as he shall reside upon his deanery, and no spiritual person having or holding any professorship or any public readership in either of the said universities, while actually resident within the precincts of the university, and reading lectures therein, (provided always, that a certificate under the hand of the vice-chancellor or warden of the university, stating the fact of such residence, and of the due performance of such duties, shall in every such case be transmitted to the bishop of the diocese wherein the benefice held by such spiritual person is situate within six weeks after the thirty-first day of December in each year;) and no spiritual person serving as chaplain of the queen's or king's most excellent majesty, or of the queen dowager, or of any of the queen's or king's children, brethren, or sisters, during so long as he shall actually attend in the discharge of his duty as such chaplain in the household to which he shall belong; and no chaplain of any archbishop or bishop, whilst actually attending in the discharge of his duty as such chaplain; and no spiritual person actually serving as chaplain of the House of Commons, or as clerk of the queen's or king's closet, or as a deputy clerk thereof, while any such person shall be actually attending and performing the functions of his office; and no spiritual person serving as chancellor or vicar-general or commissary of any diocese, whilst exercising the duties of his office; or as archdeacon, while upon his visitation, or otherwise engaged in the exercise of his archidiaconal functions; or as dean or subdean, or priest or reader,

Privileges for
temporary
Non-resi-
dence.

1 & 2 Vict.
c. 106.
*Penalties for
Non-Resi-
dence.*

in any of the queen's or king's royal chapels at St. James's or Whitehall, or as reader in the queen's or king's private chapels at Windsor or elsewhere, or as preacher in any of the Inns of Court, or at the Rolls, whilst actually performing the duty of any such office respectively; and no spiritual person, being provost of Eton College, or warden of Winchester College, or master of the Charter House, or principal of Saint David's College, or principal of King's College, London, during the time for which he may be required to reside and shall actually reside therein respectively, shall be liable to any of the penalties or forfeitures in this act contained for or on account of non-residence on any benefice for the time in any year during which he shall be so as aforesaid resident, engaged, or performing duties, as the case may be, but every such spiritual person shall, with respect to residence on a benefice under this act, be entitled to account the time in any year during which he shall be so as aforesaid resident, engaged, or performing duties, as the case may be, as if he had legally resided during the same time on some other benefice; any thing in this act contained to the contrary notwithstanding."

Performance
of Cathedral
Duties, &c.
may be ac-
counted as
Residence,
under certain
Restrictions.

[Sect. 39. "That it shall be lawful for any spiritual person, being prebendary, canon, priest vicar, vicar choral, or minor canon in any cathedral or collegiate church, or being a fellow of one of the said colleges of Eton or Winchester, who shall reside and perform the duties of such office during the period for which he shall be required to reside and perform such duties by the charter or statutes of such cathedral or collegiate church or college, as the case may be, to account such residence as if he had resided on some benefice: Provided always, that nothing herein contained shall be construed to permit or allow any such prebendary, canon, priest vicar, vicar choral, minor canon, or fellow, to be absent from any benefice on account of such residence and performance of duty for more than five months altogether in any one year, including the time of such residence on his prebend, canonry, vicarage, or fellowship: Provided also, that it shall be lawful for any spiritual person having or holding any such office in any cathedral or collegiate church or college in which the year for the purposes of residence is accounted to commence at any other period than the first of January, and who may keep the periods of residence required for two successive years at such cathedral or collegiate church or college, in whole or in part, between the first of January and the thirty-first of December in any one year, to account such residence, although exceeding five months in the year, as reckoned from the first of January to the thirty-first of December, as if he had resided on some benefice, any thing in this act contained to the contrary notwithstanding."

Existing
Rights as to
Exemptions
and Licences
preserved.

[Sect. 40. "Provided always, that every spiritual person being in possession of any benefice at the time of the passing of this act, and entitled by the law previously in force to exemption from residence, or to apply for a licence for non-residence, shall, as to every such benefice, but not as to any after-taken benefice, be entitled to the same exemption from residence, and to the same capacity of applying for and obtaining a licence for non-residence, and to the same right of appeal, in case of refusal or revocation of a licence,

to which he was entitled before the time of the passing of this act ; and every bishop and other person empowered before the passing of this act to grant such licence to such spiritual person shall have the like power after the passing thereof, any thing hereinbefore contained to the contrary notwithstanding."

1 & 2 Vict.
c. 106.
*Penalties for
Non-Resi-
dence.*

[Sect. 41. " Provided also, and be it enacted, that every spiritual person having any house of residence upon his benefice, who shall not reside therein, shall, during such period or periods of non-residence, whether the same shall be for the whole or part of any year, keep such house of residence in good and sufficient repair ; and in every such case it shall be lawful for the bishop to cause a survey of such house of residence to be made by some competent person, the costs of which, in case the house shall be found to be out of repair, shall be borne by such spiritual person ; and if the surveyor shall report that such house of residence is out of repair, it shall be lawful for the bishop to issue his monition to the incumbent to put the same in repair, according to such survey and report, a copy of which shall be annexed to the monition ; and every such non-resident spiritual person who shall not keep such house of residence in repair, and who shall not, upon such monition, and within one month after service of such monition, show cause to the contrary to the satisfaction of the bishop, or put such house in repair within the space of ten months, to the satisfaction of such bishop, shall be liable to all the penalties for non-residence imposed by this act during the period of such house of residence remaining out of repair, and until the same shall have been put in repair."

If House of
Residence
not kept in
repair, the
Incumbent
to be liable
to the Penal-
ties for Non-
residence.

[3. *Licences for Non-Residence.*

[Sect. 42. " And be it enacted, that every spiritual person applying for a licence for non-residence shall present to the bishop a petition signed by himself or by some person approved by the bishop in that behalf, and shall state therein whether such spiritual person intends to perform the duty of his benefice in person, and in that case where and at what distance from the church or chapel of such benefice he intends to resides ; and if he intends to employ a curate such petition shall state what salary he proposes to give to such curate, and whether the curate proposes to reside or not to reside in the parish in which such benefice is situate : and if the curate intends to reside therein, then whether in the house of residence belonging to such benefice, or in some and what other house ; and if he does not intend to reside in the parish, then such petition shall state at what distance therefrom, and at what place, such curate intends to reside, and whether such curate serves any other and what parish as incumbent or curate, or has any and what cathedral prebend, and any and what benefice, or officiates in any other and what church or chapel ; and such petition shall also state the annual value and the population of the benefice in respect of which any licence for non-residence shall be applied for, and the number of churches or chapels, if more than one, upon such benefice, and the date of the admission of such spiritual person to the said benefice ; and it shall not be lawful for the bishop to grant any such licence unless such petition shall contain a statement of the several parti-

Every Peti-
tion for Li-
cence for
Non-Resi-
dence to be
in Writing,
and to state
certain Par-
ticulars.

1 & 2 Vict.
c. 106.
*Licences for
Non-Resi-
dence.*

Bishop may
grant Li-
cences for
Non-Resi-
dence in
certain
enumerated
Cases.

culars aforesaid; and every such petition shall be filed in the registry of the diocese by the registrar thereof, and shall be open to inspection, and copies thereof made, with the leave in writing of the bishop."

[Sect. 43. "That it shall be lawful for the bishop, upon such petition being presented to him, and upon such proofs being adduced as to any facts stated in any such petition as he may think necessary and shall require, to grant, in such cases as are hereinafter enumerated, in which he shall think fit to grant the same, a licence in writing under his hand for such spiritual person to reside out of the proper house of residence of his benefice, or out of the limits of his benefice, or out of the limits prescribed by this act, for the purpose of exempting such person from any pecuniary penalty in respect of any non-residence thereon; which licence shall express the cause of granting the same licence, (that is to say), to any spiritual person who shall be prevented from residing in the proper house of residence or within the limits of such benefice, or within the limits prescribed by this act, by any incapacity of mind or body; and also for a period not exceeding six months to any spiritual person on account of the dangerous illness of his wife or child making part of his family, and residing with him as such; but that no such licence on account of the illness of a wife or child shall be renewed save with the allowance of the archbishop of the province previously signified under his hand in pursuance of a recommendation in writing from the bishop, setting forth the circumstances, proofs, and reasons which induce him to make such recommendation; and also to any spiritual person having or holding any benefice wherein there shall be no house of residence, or where the house of residence shall be unfit for the residence of such spiritual person, such unfitness not being occasioned by any negligence, default, or other misconduct of such spiritual person, and such spiritual person keeping such house of residence, if any, and the buildings belonging thereto, in good and sufficient repair and condition to the satisfaction of the bishop, and a certificate under the hand of two neighbouring incumbents, countersigned by the rural dean, if any, that no house convenient for the residence of such spiritual person can be obtained within the parish, or within the limits prescribed by this act, being first produced to the bishop; and also to grant to any spiritual person holding any benefice, and occupying in the same parish any mansion or messuage whereof he shall be the owner, a licence to reside in such mansion or messuage, such spiritual person keeping the house of residence and other buildings belonging thereto in good and sufficient repair and condition, and producing to the bishop proof to his satisfaction at the time of granting every such licence of such good and sufficient repair and condition: provided always, that any such spiritual person, within one month after refusal of any such licence, may appeal to the archbishop of the province, who shall confirm such refusal, or direct the bishop to grant a licence under this act, as shall seem to the said archbishop just and proper."

Appeal to
Archbishop
in case of
Refusal.

In Cases not
enumerated
Bishops
may grant

[Sect. 44. "That it shall be lawful for any bishop, in any case not hereinbefore enumerated, in which such bishop shall think it expedient, to grant to any spiritual person holding any benefice

within his diocese a licence to reside out of the limits of such benefice: provided always, that in every such case the nature and special circumstances thereof, and the reasons that have induced such bishop to grant such licence, shall be forthwith transmitted to the archbishop of the province, who shall forthwith proceed therein as hereinafter provided in cases of appeal, and shall allow or disallow such licence in the whole or in part, or make any alteration therein, as to the period for which the same may have been granted or otherwise; and no such licence shall be valid unless it shall have been so allowed by such archbishop, such allowance thereof being signified by the signing thereof by such archbishop: provided also, that it shall not be necessary in such licence to specify the cause of granting the same."

1 & 2 Vict.
c. 106.
*Licences for
Non-Resi-
dence.*

Licences to
reside out of
Limits of
Benefice,
subject to
Allowance
by the Arch-
bishop.

[Sect. 45. "That during the vacancy of any see the power of granting licences of non-residence under this act, subject to the regulations herein contained, shall be exercised by the guardian of the spiritualities of the diocese; or in case the bishop of any diocese shall be disabled from exercising in person the functions of his office, such power shall be exercised by the person or persons lawfully empowered to exercise his general jurisdiction in the diocese: provided always, that no licence granted by any other than the bishop shall be valid until the archbishop of the province shall have signified his approbation of the grant of such licence by signing the same."

By whom
Licences may
be granted
while a See
is vacant, &c.

[Sect. 46. "That no licence for non-residence granted under this act or under the said hereinbefore second-recited act shall continue in force after the thirty-first day of December in the year next after the year in which such licence shall have been or shall be granted."

Duration of
Licences.

[Sect. 47. "That every person obtaining any licence of non-residence shall pay for the same to the secretary or officer of the bishop, or other person granting the same, the sum of ten shillings, over and above the stamp-duty chargeable thereon, and no more, and also the sum of three shillings, and no more, to the registrar of the diocese, and shall also pay the sum of five shillings to the secretary of the archbishop when any such licence shall have been signed by such archbishop."

Fee for
Licence.

[Sect. 48. "That no licence of non-residence shall become void by the death or removal of the bishop granting the same, but the same shall be and remain valid notwithstanding any such death or removal, unless the same shall be revoked as hereinafter mentioned."

Licences not
to be void by
the Death or
Removal of
the Grantor.

[Sect. 49. "That it shall be lawful for any archbishop or bishop who shall have granted any licence of non-residence as aforesaid, or for any successor of any such archbishop or bishop, after having given such incumbent sufficient opportunity of showing reason to the contrary, in any case in which there may appear to such archbishop or bishop good cause for revoking the same, by an instrument in writing under his hand to revoke any such licence: provided always, that any such incumbent may, within one month after service upon him of such revocation, if by a bishop, appeal to the archbishop of the province, who shall confirm or annul such revocation as to him shall appear just and proper."

Licences
may be
revoked.

1 & 2 Vict.
c. 106.
*Licences for
Non-Resi-
dence.*

Copies of
Licences or
Revocations
to be filed in
the Registry
of the Dio-
cese, and a
List kept for
Inspection;
and Copies
transmitted
to Church-
wardens, and
publicly read
at the first
Visitation.

[Sect. 50. "That every bishop who shall grant or revoke any licence of non-residence under this act shall and he is hereby required, within one month after the grant or revocation of such licence, to cause a copy of every such licence or revocation to be filed in the registry of his diocese; and an alphabetical list of such licences and revocations shall be made out by the registrar of such diocese, and entered in a book, and kept for the inspection of all persons, upon payment of three shillings, and no more; and a copy of every such licence, and a statement in writing of the grounds of exemption, shall be transmitted by the spiritual person to whom such licence shall have been granted, or who may be exempted from residence, to the churchwardens or chapelwardens of the parish or place to which the same relates, within one month after the grant of such licence, or of his taking advantage of such exemption, as the case may be; and every bishop revoking any such licence shall cause a copy of such revocation to be transmitted, within one month after the revocation thereof, to the churchwardens or chapelwardens of the parish or place to which it relates; which copies of licences and revocation, and statements of exemption, shall be by such churchwardens or chapelwardens deposited in the parish chest, and shall likewise be produced by them, and publicly read by the registrar or other officer, at the visitation of the ecclesiastical district within which such benefice shall be locally situate next succeeding the receipt thereof; and every spiritual person who shall neglect so to transmit a copy of such licence or statement of exemption, as hereby required, shall lose all benefit of such licence, and until he shall have transmitted such statement, shall not be entitled to the benefit of such exemption: provided always, that in case the archbishop of the province shall on appeal to him annul the revocation of any such licence, the bishop by whom such revocation shall have been made shall, immediately on receiving notice from the archbishop that he has annulled the same, order, by writing under his hand, that the copies of such revocation shall be forthwith withdrawn from the said registry and parish chest, and that the same shall not be produced and read at the visitation, and that such revocation shall be erased from the list of revocations in the said registry; which order shall be binding on the registrar and churchwardens respectively to whom the same shall be addressed."

List of
Licences
allowed by
the Arch-
bishop, or
granted in his
own Diocese,
to be annually
transmitted to
her Majesty
in Council,
who may
revoke Li-
cences, &c.

[Sect. 51. "That every archbishop who shall in his own diocese grant any licence of non-residence, or who shall approve and allow, in manner directed by this act, any such licence in any case not enumerated in this act, or any renewal of a licence in the case of the dangerous illness of the wife or child of any spiritual person, shall annually in the month of January in each year transmit to her Majesty in council a list of all licences or renewals so granted or allowed by such archbishop respectively in the year ending on the last day of December preceding such month of January, and shall in every such list specify the reasons which have induced him to grant or allow each such licence or renewal, together with the reasons transmitted to him by the bishops for granting or recommending each such licence in their respective dioceses; and it shall be lawful for her Majesty in council, by an order made for that purpose, to revoke and annul any such licence; and if her

Majesty in council shall think fit so to do, such order shall be transmitted to the archbishop who shall have granted or approved and allowed such licence or renewal, who shall thereupon cause a copy of every such order to be transmitted to the bishop of the diocese in which such licence shall have been granted; and such bishop shall cause a copy of the mandatory part of the order to be filed in the registry of such diocese, and a like copy to be delivered to the churchwardens or chapelwardens of the parish or place to which the same relates, in manner hereinbefore directed as to revocation of licences; and every such archbishop shall cause a copy of the mandatory part of every such order made in relation to any such licence granted by him in his own diocese to be in like manner filed in the registry of his diocese, and a like copy also to be delivered to the churchwardens or chapelwardens of the parish or place to which such licence shall relate in manner before mentioned: provided always, that after such licence shall have been so revoked by her Majesty in council, the same shall nevertheless, in all questions that shall have arisen or may hereafter arise touching the non-residence of the spiritual person to whom the same shall have been granted, between the time at which the same was granted or approved and allowed, and the time of the revocation thereof being so filed in the registry, be deemed and taken to have been valid."

1 & 2 Vict.
c. 106.
*Licences for
Non-Resi-
dence.*

Licence,
although
revoked, to
be deemed
valid between
the Grant and
Revocation.

[4. *Questions to be put by Bishop to Incumbent.*

[Sect. 52. "That it shall be lawful for each bishop, and he is hereby required to transmit, some time in the month of January in each year, to every spiritual person holding any benefice within his diocese or jurisdiction, the questions contained in the first schedule to this act, for the purpose of better enabling the several bishops to make the returns herein-after mentioned; and every spiritual person to whom such questions shall be so transmitted shall, within three weeks from the day on which the same shall be delivered to him, or to the officiating minister of the benefice for the time being, make and transmit to the bishop full and specific answers thereto, such answers being signed, by such spiritual person."

Incumbents
to answer
Questions
transmitted to
them by
Bishop.

[The schedule is as follows:—

["The FIRST SCHEDULE referred to in the foregoing Act.

["QUESTIONS to be annually transmitted by each bishop to every spiritual person holding any benefice within his diocese or jurisdiction.

- [1. What is the name of your benefice?
- [2. In what county?
- [3. Name of incumbent, and date of admission?
- [4. Is there a glebe house belonging to your benefice?
- [5. Were you resident in the glebe house, or, there being no glebe house, or none fit for your residence, were you resident in any and what house appointed by the bishop in his licence, during the last year, for the term prescribed by law?
- [6. Being non-resident, were you performing the duties of your parish for the said time? If so, state where you resided, and at what distance from the church or chapel?

1 & 2 Vict.
c. 106.

Questions by
Bishop to
Incumbent.

- [7. Were you in the last year serving any other church or chapel in the neighbourhood as incumbent? If so, state the name thereof, and the distance from the above-named church or chapel; and when and for how long you served the same?
- [8. Were you serving any other church or chapel in the neighbourhood as curate? If so, state the name thereof, and the distance from your own church or chapel; and when and for how long you served the same?
- [9. What are the services in your church? Is a sermon or lecture given at every or which of such services?
- [10. Were these services duly performed last year? If not, for what reason?
- [11. What are the services in your chapel or chapels, if any? Is a sermon or lecture given at every or which of such services?
- [12. Were these services duly performed last year? If not, for what reason?
- [13. Have you any assistant curate or curates? If so, state his or their names; also whether he or they is or are licensed, and the amount of his or their stipend or respective stipends?
- [14. If you were non-resident, were you so by licence?
- [15. If non-resident by licence, state the ground of licence, and the time when it will expire?
- [16. If non-resident without licence, were you so by exemption?
- [17. If non-resident by exemption, state the ground of exemption, and whether such exemption was claimed for the whole year, or during what part thereof?
- [18. If you were non-resident, and did not perform the duties of your benefice, what ecclesiastical duties, if any, were you performing, and where do you now reside?

[OBSERVE: The foregoing questions are to be answered by every incumbent, whether resident or not.

[Further Questions to be answered, in addition to the foregoing, in case the Incumbent be non-resident.

- [19. What is the name of your curate?
- [20. Does he reside in the glebe house?
- [21. Does he pay any and what rent or consideration for the use of the glebe house? or is any deduction made on account thereof from the stipend assigned to him in his licence?
- [22. If not resident in the glebe house, does he reside in the parish?
- [23. If not resident in the parish, where does he reside, and at what distance from your church or chapel?
- [24. Does he serve any other church or chapel as incumbent? If so, state the name thereof, and the distance from your own church or chapel.
- [25. Does he serve any other church or chapel as curate? If so, state the name thereof, and the distance from your own church or chapel?
- [26. Is he licensed?
- [27. What is his salary from you?
- [28. Has he from you any other allowances or emoluments? State what, and the average value thereof respectively?

[29. What is the gross and what is the net annual value of your benefice? 1 & 2 Vict.
c. 106.

[N. B. All the questions have reference to the year immediately preceding that in which they are transmitted.]

[5. *Return to her Majesty in Council.*

[Sect. 53. "Be it enacted, that on and before the twenty-fifth day of March, in every year, a return shall be made to her Majesty in council, by every bishop, of the name of every benefice within his diocese or jurisdiction, and the names of the several spiritual persons holding the same respectively who shall have resided thereon; and also the names of the several spiritual persons who, by reason of any exemption under or by virtue of this act, or by reason of any licence granted by such bishop, shall not have resided on their respective benefices; and also the names of all spiritual persons, not having any such exemption or licence, who shall not have resided on their respective benefices, so far as the bishop is informed thereof; and also the substance of the answers received in all cases to the questions so transmitted as aforesaid.

Annual
Return to be
made to her
Majesty in
Council of
Residents and
Non-resi-
dents, &c.

[6. *Curates of Non-Residents.*

[Sect. 75. "That if any spiritual person holding any benefice, who shall not actually reside thereon nine months in each year, (unless such person shall, with the consent of the bishop, from time to time, signified in writing under his hand, and revocable at any time, perform the ecclesiastical duties of the same, he either being resident on another benefice, of which he shall also be the incumbent, or having a legal exemption from residence on his benefice, or having a licence to reside out of the same, or to reside out of the usual house of residence belonging to the same,) shall for a period exceeding three months altogether, or to be accounted at several times, in the course of any one year absent himself from his benefice, without leaving a curate, or curates, duly licensed or approved by the bishop to perform such ecclesiastical duties, or shall, for a period of one month after the death, resignation, or removal of any curate who shall have served his church or chapel, neglect to notify such death, resignation, or removal to the bishop, or shall for the period of four months after the death, resignation, or removal of such curate, neglect to nominate to the bishop a proper curate, in every such case the bishop is hereby authorized to appoint and license a proper curate, with such salary as is by this act allowed and directed, to serve the church or chapel of the benefice in respect of which such neglect or default shall have occurred. Provided always, that such licence shall in every case specify whether the curate is required to reside within the parish or place, or not; and if the curate is permitted by the bishop to reside out of the parish or place, the grounds upon which the curate is so permitted to reside out of the same shall be specified in such licence; and the distance of the residence of any curate from any such church or chapel which he shall be licensed to serve shall not exceed three statute miles, except in cases of necessity, to be approved by the bishop, and specified in the licence.

Non-resident
Incumbents
neglecting to
appoint
Curates, the
Bishop to
appoint.

1 & 2 Vict.
c. 106.

Curate to
reside on
Benefices,
under certain
Circum-
stances.

If Duty
inadequately
performed,
the Bishop
may appoint
a Curate.

But Incum-
bent may
appeal.

In large
Benefices an
Assistant
Curate may
be required.

[Sect. 76. "That in every case where a curate is appointed to serve in any benefice upon which the incumbent either does not reside, or has not satisfied the bishop of his full purpose to reside during four months in the year, such curate shall be required by the bishop to reside within the parish or place in which such benefice is situate; or if no convenient residence can be procured within such parish or place, then within three statute miles of the church or chapel of the benefice in which he shall be licensed to serve, except in cases of necessity, to be approved of by the bishop, and specified in the licence, and such place of residence shall also be specified in the licence."

[Sect. 77. "That whenever the bishop shall see reason to believe that the ecclesiastical duties of any benefice are inadequately performed, it shall be lawful for him to issue a commission to four beneficed clergymen in his diocese, or if the benefice be within his peculiar jurisdiction, but locally situate in another diocese, then to four beneficed clergymen of such last-mentioned diocese, one whereof shall be the rural dean, if any, of the rural deanery or district wherein such benefice is situated, directing them to inquire into the facts of the case; and it shall be lawful for the incumbent of the said benefice to add to such commissioners one other incumbent of a benefice within the same diocese; and if the said commissioners, or the major part of them, report in writing under their hands to the said bishop, that in their opinion the duties of such benefice are inadequately performed, it shall be lawful for such bishop, if he shall see fit, by writing under his hand, to require the spiritual person holding such benefice, though he may actually reside or be engaged in performing the duties thereof, to nominate to him a fit person or persons, with sufficient stipend or stipends, to be licensed by him to perform or to assist in performing such duties, specifying therein the grounds of such requisition; and if such spiritual person shall neglect or omit to make such nomination for the space of three months after such requisition so made as aforesaid, it shall be lawful for the bishop to appoint and license a curate or curates, as the case shall appear to him to require, with such stipend or stipends as he shall think fit to appoint, not exceeding the respective stipends allowed to curates by this act, in the case of non-resident incumbents, nor, except in the case of negligence, exceeding one half of the net annual value of such benefice; and such bishop shall cause a copy of every such requisition, and the evidence to found the same, to be forthwith filed in the registry of his court: provided always, that it shall be lawful for any such spiritual person within one month after the service upon him of such requisition to nominate a curate, or of notice of any such appointment and licence of such curate or curates, to appeal to the archbishop of the province who shall approve or revoke such requisition, or confirm or annul such appointment, as to him may seem just and proper.

[Sect. 78. "That whenever the annual value of any benefice the incumbent whereof was not in possession at the time of the passing of this act shall exceed five hundred pounds, and the population thereof shall amount to three thousand persons, or though the population do not amount to three thousand persons, if there be in

the said benefice a second church or chapel situated not less than two miles from the mother church, and with a hamlet or district connected with it containing four hundred persons, it shall be lawful for the bishop, if he shall see fit, to require the spiritual person holding such benefice, although he shall be resident thereon or engaged in performing the duties thereof, to nominate a fit and proper person to be licensed as a curate, to assist in performing the duties of such benefice, and to be paid by the person holding the same; and if a fit person shall not be nominated to the bishop within three months after his requisition for that purpose shall have been delivered to the incumbent, or left at his last or usual place of abode, it shall be lawful for the bishop to appoint and license a curate, with such stipend as he shall think fit to appoint, not exceeding the respective stipends allowed to curates by this act, nor in any case exceeding one fifth part of the net annual value of the benefice: provided always, that such spiritual person may, within one month after service upon him of such requisition to nominate a curate, or of notice of any such appointment of a curate, appeal to the archbishop of the province, who shall approve or revoke such requisition, or confirm or annul such appointment, as to him may appear just and proper.

1 & 2 Vict.
c. 106.

Appeal.

[Sect. 79. "That in case of a stipend being assigned by the bishop, according to the provisions of this act, to the curate of any benefice, the incumbent whereof shall have been duly found a lunatic, or person of unsound mind, the committee of the estate of any such lunatic or person of unsound mind, shall pay such stipend to such curate out of the profits of the benefice which shall come to his hands.

Stipend to
be paid by
Committee
of Lunatic's
Estate.

[Sect. 80. "That it shall be lawful for the bishop, in his discretion, to order that there shall be two full services, each of such services, if the bishop shall so direct, to include a sermon or lecture on every Sunday throughout the year, or any part thereof, in the church or chapel of every or any benefice within his diocese, whatever may be the annual value or the population thereof; and also in the church or chapel of every parish or chapelry, where a benefice is composed of two or more parishes or chapelries, in which there shall be a church or chapel, if the annual value of the benefice arising from the parish or chapelry shall amount to one hundred and fifty pounds, and the population of that parish or chapelry shall amount to four hundred persons: provided always, that nothing herein contained shall be taken to repeal or affect the provisions of an act passed in the fifty-eighth year of the reign of his majesty King George the Third, intituled, 'An Act for building and promoting the building of additional Churches in populous Parishes,' by which the bishop of any diocese is empowered to direct the performance of a third or additional service in the several churches or chapels within his diocese, under the circumstances therein mentioned.

Bishops may
enforce Two
Services on
Sundays, in
certain Cases.

Not to affect
the Provision
of the Act
58 Geo. 3,
c. 45, s. 65.

[Sect. 81. "That every bishop to whom any application shall be made for any licence for a curate to serve for any person not duly residing upon his benefice shall, before he shall grant such licence, require a statement of all the particulars by this act required to be stated by any person applying for a licence for non-residence; and

Statement of
Particulars
necessary to
be given, and
Declaration
to be made,
on Applica-
tion for a
Licence for
a Curate.

1 & 2 Vict.
c. 106.

in every case in which application shall be made to any bishop for a licence for any stipendiary curate to serve in any benefice, whether the incumbent be resident or non-resident, such bishop shall also require a declaration in writing to be made and subscribed by the incumbent and the curate, to the purport and effect that the one *bond fide* intends to pay, and the other *bond fide* intends to receive, the whole actual stipend mentioned in such statement, without any abatement in respect of rent or consideration for the use of the glebe house, and without any other deduction or reservation whatever."

Fee for
Licence.

[Sect. 82. "That every curate obtaining such licence as aforesaid shall pay to the secretary or other proper officer of the bishop for the same the sum of ten shillings, over and above any stamp duty which may be chargeable thereon, which sum of ten shillings shall be in lieu of all fees heretofore demandable by such secretary or officer for such licence, or for any certificate connected therewith; and that whenever any person shall be licensed to two curacies within the same diocese at the same time, it shall be sufficient for such person to sign a declaration appointed to be signed by an act, intituled 'An Act of Uniformity,' once only; and it shall be sufficient for such person to produce one certificate only of his having so signed such declaration."

Bishop shall
appoint
Stipends to
Curates;

[Sect. 83. "That it shall be lawful for the bishop of the diocese, and he is hereby required, subject to the several provisions and restrictions in this act contained, to appoint to every curate of a non-resident incumbent such stipend as is specified in this act; and every licence to be granted to a stipendiary curate, whether the incumbent of the benefice be resident or non-resident thereon, shall specify the amount of the stipend to be paid to the curate; and in case any difference shall arise between the incumbent of any benefice and his curate touching such stipend, or the payment thereof or of the arrears thereof, the bishop, on complaint to him made, may and shall summarily hear and determine the same, without appeal; and in case of wilful neglect or refusal to pay such stipend, or the arrears thereof, he is hereby empowered to enforce payment of such stipend, or the arrears thereof, by monition, and by sequestration of the profits of such benefice."

and decide
Differences
respecting
them.

Stipends to
Curates of
Incumbents
before 20th
July, 1813,
not to exceed
a certain
Rate.

[Sect. 84. "That it shall not be lawful for the bishop to appoint for the curate of any benefice, to which the spiritual person holding the same was instituted, licensed, or otherwise admitted before the twentieth day of July, one thousand eight hundred and thirteen, any stipend exceeding seventy-five pounds *per annum*, together with the use of the house of residence, and the gardens and stables belonging thereto, or a further sum of fifteen pounds in lieu of the use of the rectory or vicarage house, or other house of residence, in case there shall be no house, or it shall not appear to the bishop convenient to assign the house to the curate."

Stipends to
Curates to be
according to
specified
Scale, pro-
portioned to
the Value and
Population
of the Bene-
fice.

[Sect. 85. "That in every case in which any spiritual person shall have been, since the twentieth day of July, one thousand eight hundred and thirteen, or shall hereafter be instituted, inducted, nominated, or appointed to, or otherwise become incumbent of any benefice, and shall not duly reside thereon, the bishop shall appoint for the curate licensed under the provisions of this act to serve such benefice

such stipend as is hereinafter next mentioned; (that is to say,) such stipend shall in no case be less than eighty pounds *per annum*, or than the annual value of the benefice, if such value shall not amount to eighty pounds; nor less than one hundred pounds *per annum*, or than the whole value, if such value shall not amount to one hundred pounds, in any parish or place where the population shall amount to three hundred persons; nor less than one hundred and twenty pounds *per annum*, or than the whole value, if such value shall not amount to one hundred and twenty pounds, in any parish or place where the population shall amount to five hundred persons; nor less than one hundred and thirty-five pounds *per annum*, or than the whole value, if such value shall not amount to one hundred and thirty-five pounds, in any parish or place where the population shall amount to seven hundred and fifty persons; nor less than one hundred and fifty pounds *per annum*, or than the whole value, if such value shall not amount to one hundred and fifty pounds, in any parish or place where the population shall amount to one thousand persons."

1 & 2 Vict.
c. 106.

[Sect. 86. "That where the annual value of any such benefice shall exceed four hundred pounds, it shall be lawful for the bishop to assign to the curate, being resident within the same, and serving no other cure, a stipend of one hundred pounds, notwithstanding the population may not amount to three hundred persons; and that where the annual value of any such benefice shall exceed four hundred pounds, and the population shall amount to five hundred persons, it shall be lawful for the bishop to assign to the curate, being resident within the same, and serving no other cure, any larger stipend, so that the same shall not exceed by more than fifty pounds *per annum* the amount of the stipend hereinbefore required to be assigned to any such curate; and that where the population of any such benefice shall exceed two thousand persons, it shall be lawful for the bishop to require the incumbent thereof to nominate to him two persons to be licensed as curates; and if such spiritual person shall neglect or omit to make such nomination for the space of three months after such requisition so made as aforesaid, it shall be lawful for the bishop to appoint and license two curates or a second curate, and in all and every of such cases to assign to each curate so nominated or appointed such stipend as he shall think fit, not exceeding together the highest rate of stipend allowed by this act in the case of one such curate, except in cases where the incumbent shall consent to a larger stipend: Provided always, that such incumbent may within one month after service upon him of such requisition, or of notice of any such appointment of two curates or a second curate, appeal to the archbishop of the province, who shall approve or revoke such requisition or confirm or annul such appointment, as to him may appear just and proper."

Larger Stipends in certain Cases of larger Value and Population.

Bishop may require Two Curates.

Appeal.

[Sect. 87. "That in every case in which the bishop shall be satisfied that any spiritual person holding any benefice within his diocese is non-resident, or has become incapable of performing the duties thereof from age, sickness, or other unavoidable cause, and that, from these or from any other special and peculiar circumstances, great hardship or inconvenience would arise if the full stipend specified in this act should be allowed to the curate of such

Smaller Stipends in certain Cases.

1 & 2 Vict.
c. 106.

Stipend of
Curate en-
gaged to
serve inter-
changeably
at different
Benefices
belonging to
the same In-
cumbent.

How the Sti-
pends shall
be adjusted
where the
Curate is
permitted to
serve in two
adjoining
Parishes.

Agreements
for Stipends
to Curates
contrary to
this Act void.

benefice, it shall be lawful for such bishop, with the consent of the archbishop of the province, to be signified in writing under the hand of the said archbishop upon the licence to be granted to such curate, to assign to the curate such stipend less than the full amount in this act specified as shall appear to him just and reasonable: Provided always, that in the licence granted in every such case it shall be stated that for special reasons the bishop hath not thought proper to assign to the curate the full stipend required by this act: Provided also, that such special reasons shall be entered fully in a separate book to be kept for that purpose, and to be deposited in the registry of the diocese, which book shall be open to inspection with the leave of the bishop, as in the cases of application for licences for non-residence."

[Sect. 88. "That if any incumbent of two benefices, residing *bonâ fide* in different proportions of every year on one or other of such benefices the full period specified by this act, shall employ a curate to perform ecclesiastical duty interchangeably from time to time upon such of the benefices from which he shall be absent during his own actual residence upon the other thereof, it shall be lawful for the bishop to assign to such curate any stipend not exceeding such stipend as would be allowed under this act for the larger of such benefices, nor less than would be allowed for the smaller, as to the bishop shall under all the circumstances appear just and reasonable: Provided always, that if any such incumbent shall employ a curate or curates for the whole year upon each of such benefices, such incumbent so residing *bonâ fide* as aforesaid, in such case it shall be lawful for the bishop to assign to either or each of such curates any such stipend less than the amount specified in this act as he shall think fit."

[Sect. 89. "That in every case where the bishop shall find it necessary or expedient for obtaining the proper performance of ecclesiastical duties to license any spiritual person holding any benefice to serve as curate of any adjoining or other parish or place, it shall be lawful for such bishop, if he shall think fit, to assign to such person so licensed a stipend less by a sum not exceeding thirty pounds *per annum* than the stipend which in the several cases in this act specified the bishop is required to assign; and in every case where the bishop shall find it necessary or expedient to license the same person to serve as curate for two parishes or places, it shall be lawful for such bishop, if he shall think fit, to direct that during such time as such curate shall serve the churches or chapels of such two parishes or places the stipend to be received by him for serving each of the said churches or chapels shall be less by a sum not exceeding thirty pounds *per annum* than the stipend which in the several cases hereinbefore specified the bishop is required by this act to assign."

[Sect. 90. "That all agreements made or to be made between persons holding benefices and their curates, in fraud or derogation of the provisions of this act, and all agreements whereby any curate shall undertake or in any manner bind himself to accept or be content with any stipend less than that which shall be assigned by his licence, shall be void to all intents and purposes, and shall not be pleaded or given in evidence in any court of law or equity; and,

notwithstanding the payment and acceptance, in pursuance of any such agreement, of any sum less than that assigned by the licence, or any receipt, discharge, or acquittance that may be given for the same, the curate and his personal representatives shall be and remain entitled to the full amount of the stipend assigned by his licence; and the payment of so much thereof as shall be proved to the satisfaction of the bishop to remain unpaid shall, together with full costs of recovering the same as between proctor and client, be enforced by monition, and by sequestration of the profits of the benefice, to be issued by the bishop for that purpose on application made by the curate or his representatives; provided that such application shall in every such case be made to the bishop within twelve months after such curate shall have quitted his curacy, or have died."

1 & 2 Vict.
c. 106.

[Sect. 91. "That in every case in which the bishop shall assign to any curate a stipend equal to the whole annual value of the benefice in which he is licensed to serve, such stipend shall be subject to deduction in respect to all such charges and outgoings as may legally affect the value of such benefice, and to any loss or diminution which may lessen such value, without the wilful default or neglect of the spiritual person holding the benefice."

Curate's Stipend, if of the Value of the Benefice, liable to all Charges.

[Sect. 92. "That in every such case as last aforesaid it shall be lawful for the bishop, upon the application of the spiritual person holding the benefice, to allow such spiritual person to retain in each year so much money, not exceeding in any case one-fourth part of the annual value, as shall have been actually expended during the year in the repair of the chancel and of the house of residence and premises and appurtenances thereto belonging, in respect of which such spiritual person, or his executors or administrators, would be liable for dilapidations to the successor; and it shall also be lawful for the bishop in like manner to allow any spiritual person holding any benefice the annual value whereof shall not exceed one hundred and fifty pounds to deduct from the stipend assigned to the curate in each year so much money as shall have been actually expended in such repairs above the amount of the surplus remaining of such value after payment of such stipend; provided that the sum so deducted, after laying out such surplus, shall not in any year exceed one-fourth part of such stipend."

Bishop may allow Incumbent to deduct from Curate's Stipend for Repairs to a limited Amount, in certain Cases.

[Sect. 93. "That it shall be lawful for the bishop who shall have granted any licence to any curate to serve in any benefice the incumbent whereof is not resident for four months in each year, and who shall have required such curate to reside in the house of residence belonging to the benefice, to assign to such curate such house of residence, together with the offices, stables, gardens, and appurtenances thereto belonging, or any part or parts thereof, without payment of any rent, and also to assign any portion of glebe land adjacent to the house, and not exceeding four statute acres, at such rent as shall be fixed by the archdeacon of the archdeaconry, or by the rural dean, if any, of the deanery, or district within which the benefice is situate, and one neighbouring incumbent, and approved of by the bishop, during the time of such curate's serving the cure, or during the non-residence of the incumbent of such benefice; and it shall be lawful for the bishop making any such assign-

Curate directed to reside in Parsonage House, in case of Non-residence of Incumbent, may have certain Portion of Glebe assigned to him by Bishop.

1 & 2 Vict.
c. 106.

Curates to
pay Taxes of
Parsonage
Houses in
certain Cases.

Curate to
quit Cure
upon having
six Weeks'
Notice from
new Incum-
bent within
six Months
after his Ad-
mission, and
in other
Cases Incum-
bent, with
Bishop's
permission,
may dispos-
sess Curate
of Cure on
six Months'
Notice.
Appeal.

Curate peace-
ably to de-
liver up pos-
session of
House of Re-
sidence with-
in six Months
after Notice,
or pay 40s.
per Day.

ment to any curate to sequester the profits of the benefice in any case in which possession of the premises so assigned shall not be given up to the curate, and until such possession shall be given, and to direct the application of the profits arising from such sequestration as is hereinbefore directed in the case of sequestration for non-residence, or to remit the same or any part thereof, as the bishop shall in his discretion think fit."

[Sect. 94. "That in every case where the bishop shall assign to the curate licensed to serve in any benefice a stipend not less than the whole value of the same, and shall in addition to such stipend direct that such curate shall reside in the house of residence belonging to such benefice, such curate shall be liable during the time of his serving such cure to the same taxes and parochial rates and assessments, in respect of such house, premises, and appurtenances thereto belonging, as if he had been incumbent of the benefice: Provided always, that in every other case in which the curate shall so reside by direction of the bishop it shall be lawful for such bishop, if he shall think fit, to order that the incumbent shall pay to the curate all or any part of such sums as he may have been required to pay and shall have actually paid within one year ending at Michaelmas day next preceding the date of such order for any such taxes, parochial rates, or assessments as shall become due at any time after the passing of this act, and the bishop may, if necessary, enforce payment thereof by monition, and sequestration of the profits of such benefice."

[Sect. 95. "That every curate shall quit and give up the cure of any benefice which shall become vacant upon having six weeks' notice from the spiritual person admitted, collated, instituted, or licensed to such benefice, provided such notice shall be given within six months from the time of such admission, collation, institution, or licence; and that in all other cases it shall be lawful for the incumbent of any benefice, whether resident or non-resident thereon, having first obtained the permission of the bishop of the diocese, to be signified by writing under his hand, to require any one or more of his curates, who after the passing of this act shall be licensed to any curacy, to quit and give up his curacy upon six months' notice thereof given to the curate, who shall thereupon quit the same according to such notice: Provided always that any incumbent resident on his benefice, or not resident but desiring to reside on his benefice, may, within one month after refusal of such permission as aforesaid by the bishop, appeal to the archbishop of the province, who shall either confirm such refusal or grant such permission as to him may seem just and proper."

[Sect. 96. "That every curate who shall reside in the house of residence of any benefice which shall become vacant shall peaceably deliver up possession thereof, with the appurtenances, upon having six weeks' notice from the spiritual person admitted, collated, instituted, or licensed to such benefice, provided such notice be given within six months from the time of such admission, collation, institution, or licence; and that in all other cases it shall be lawful for the incumbent of any benefice, with the permission signified in writing under the hand of the bishop of the diocese, or for such bishop, at any time, upon six months' notice in writing, to direct any

curate to deliver up the house of residence, and the offices, stables, gardens, and appurtenances thereto belonging, and such portion of the glebe land as shall have been assigned to such curate, and such curate shall thereupon peaceably deliver up the possession of the premises pursuant to such notice; and if any curate shall refuse to deliver up such premises in any or either of the cases aforesaid he shall pay to the spiritual person holding the benefice the sum of forty shilling for every day of wrongful possession after the service of such notice."

1 & 2 Vict.
c. 106.

[Sect. 97. "That no curate shall quit any curacy to which he shall be licensed until after three months' notice of his intention given to the incumbent of the benefice and to the bishop, unless with the consent of the bishop, to be signified in writing under his hand, upon pain of paying to the incumbent a sum not exceeding the amount of his stipend for six months, at the discretion of the bishop, such sum to be specified in writing under the hand of the bishop, which sum may in such case be retained out of the stipend if the same or any part thereof shall remain unpaid, or, if the same cannot be retained out of the stipend, may be recovered by the spiritual person holding the benefice by action of debt."

Curate not to quit Curacy without three Months' Notice to Incumbent and Bishop, under a Penalty.

[Sect. 98. "That it shall be lawful for the bishop to license any curate who is or shall be actually employed by any non-resident incumbent of any benefice within his diocese although no express nomination of such curate shall have been made to such bishop by the incumbent; and that the bishop shall have power, after having given to the curate sufficient opportunity of showing reason to the contrary, to revoke, summarily and without further process, any licence granted to any curate, and to remove such curate, for any cause which shall appear to such bishop to be good and reasonable: Provided always, that any such curate may, within one month after service upon him of such revocation, appeal to the archbishop of the province, who shall confirm or annul such revocation as to him shall appear just and proper."

Bishop may license Curate's employ without Nomination, revoke any Licence, and remove the Curate, subject to Appeal to the Archbishop.

[Sect. 99. "That in every case in which a benefice shall be under sequestration, except for the purpose of providing a house of residence as aforesaid, it shall be lawful to the bishop and he is hereby required, if the incumbent shall not perform the duties of the said benefice, to appoint and license a curate or curates thereto, and to assign to him or them a stipend or stipends, not exceeding, in the case of any one such curate, the highest rate of stipend allowed by this act, nor, where more than one curate is appointed, a stipend exceeding one hundred pounds to more than one such curate, such stipend or stipends to be paid by the sequestrator of such benefice out of the profits thereof: Provided always, that not more than one curate shall be appointed to any such benefice in any case in which there is not more than one church, or the population does not exceed two thousand persons."

Bishop may appoint Curates to all sequestered Benefices.

[Sect. 100. "That upon the avoidance of any benefice, by death, resignation, or otherwise, the sequestrator appointed by the bishop shall, out of the profits thereof which shall come to his hands, pay to the curate or curates appointed by such bishop to perform the ecclesiastical duties of such benefice during the vacancy thereof, such stipend or stipends as shall be ordered to be paid to him or

Stipend of Curate of sequestered Benefice to be paid by Sequestrator.

1 & 2 Vict.
c. 106.

Proviso for
Payment by
succeeding
Incumbent,
where Profits
during Se-
questration
insufficient.

them by such bishop, not exceeding the respective stipends allowed by this act, and in proportion only to the time of such vacancy."

[Sect. 101. "That if the profits of such benefice which shall have come to the hands of such sequestrator during the vacancy thereof shall not be sufficient to pay such stipend, the same, or so much thereof as shall remain unpaid, shall be paid to such curate by the succeeding incumbent of such benefice out of the profits thereof; and such bishop is hereby empowered and required, if necessary, to enforce payment of the same by monition, and by sequestration of the profits of such benefice."

7. *How Patrons and Crown are affected by this Act.*

Who to be
considered
Patron.

[Sect. 125. "That in every case in which the consent of, or the execution of any deed or deeds, instrument or instruments by, the patron of any cathedral preferment, or of any benefice, sinecure, rectory, or vicarage, or the owner or impropriator of any lands, tithes, tenements, or hereditaments, is required for carrying into effect any of the purposes of this act, and also in every case in which it may be necessary to give any notice to any such patron for any of the said purposes, the consent of execution by or notice to the patron or person entitled to make donation or present or nominate to such cathedral preferment, benefice, sinecure, rectory, or vicarage, in case the same were then vacant, or the person or persons who shall be in the actual possession, receipt, or perception of the rents, proceeds, or profits of such lands, tithes, tenements, or hereditaments for an estate or interest not less than an estate for life, shall respectively be sufficient."

How consent
of Patron to
be testified,
where Pa-
tronage in
the Crown.

[Sect. 126. "That in any case in which the consent of the patron of any benefice shall be required to the exercise of any power given by this act, or in which any notice shall be required by this act to be given to the patron of any benefice, and the patronage of such benefice shall be in the crown, the consent of the crown to the exercise of such power shall be testified and such notice shall be given respectively in the manner hereinafter mentioned; (that is to say,) if such benefice shall be above the yearly value of twenty pounds in the Queen's books, the instrument by which the power shall be exercised shall be executed by and any such notice shall be given to the lord high treasurer or first lord commissioner of the treasury for the time being; and if such benefice shall not exceed the yearly value of twenty pounds in the Queen's books, such instrument shall be executed by and any such notice shall be given to the lord high chancellor, lord keeper or lords commissioners of the great seal, for the time being; and if such benefice shall be within the patronage of the crown in right of the duchy of Lancaster, such instrument shall be executed by and any such notice shall be given to the chancellor of the said duchy for the time being; and the execution of such instrument by and any such notice given to such person or persons shall be deemed and taken for the purposes of this act to be an execution by and a sufficient notice to the patron of the benefice."

How where
Patron is an
incapacitated
Person.

[Sect. 127. "That in any case in which the consent of the patron of any benefice shall be required to the exercise of any

power given by this act, and the patron of such benefice shall be a minor, idiot, lunatic, or feme covert, it shall be lawful for the guardian or guardians, committee or committees, or husband of such patron (but in case of a feme covert with her consent in writing) to execute the instrument by which such power shall be exercised in testimony of the consent of such patron; and such execution shall for the purposes of this act be deemed and taken to be an execution by the patron of the benefice."

1 & 2 Vict.
c. 106.

[Sect. 128. "That in any case in which the consent of the patron of any benefice shall be required to the exercise of any power given by this act, or in which any notice shall be required by this act to be given to the patron of any benefice, and the advowson and right of patronage of such benefice shall be part of the possessions of the duchy of Cornwall, the consent of the patron of such benefice to the exercise of such power shall be testified and such notice shall be given respectively in the manner hereinafter mentioned; (that is to say,) the instrument by which the power shall be exercised shall be executed by and any such notice shall be given to the duke of Cornwall for the time being, if of full age, but if such benefice shall be within the patronage of the crown in right of the duchy of Cornwall, such instrument shall be executed by and any such notice shall be given to the same person or persons who is or are by this act authorized to testify the consent of the crown to the exercise of any power given by this act in respect of any benefice in the patronage of the crown; and the execution of such instrument by and any such notice given to such person or persons shall be deemed and taken for the purposes of this act to be an execution by and a sufficient notice to the patron of the benefice."

How where
Patronage is
attached to
the Duchy of
Cornwall.

[8. *Fees for Licences, &c.*

[Sect. 102. "And be it enacted, that every bishop who shall grant or revoke any licence to any curate under this act shall cause a copy of such licence or revocation to be entered in the registry of the diocese; and an alphabetical list of such licences and revocations shall be made out by the registrar of each diocese, and entered in a book, and kept for the inspection of all persons, upon payment of three shillings, and no more; and a copy of every such licence and revocation shall be transmitted by the said registrar to the churchwardens or chapelwardens of the parish, township, or place to which the same relates, within one month after the grant of such licence or revocation thereof, to be by them deposited in the parish chest: provided always, that every such registrar shall for every such copy transmitted to such churchwardens or chapelwardens as aforesaid be entitled to demand and receive from the incumbent of such benefice a fee of three shillings, and no more: provided also, that in case the archbishop shall, on appeal to him, annul the revocation of any such licence, the bishop by whom such revocation shall have been made shall, immediately on receiving notice from the archbishop that he had annulled the same, make such or the like order as is hereinbefore directed to be made on the revocation of a licence for non-residence being annulled, which order shall be

Licences to
Curates, and
Revocations
thereof, to be
entered in the
Registry of
the Diocese.

binding on the registrar and churchwardens respectively to whom the same shall be addressed."

[Sections 103, 104 and 105 relate to Welsh benefices. See title *Wales* (o).]

Tables of Fees to be taken by Officers with respect to Admissions to Benefices, by whom to be established.

[Sect. 131. "That the archbishop of Canterbury, the lord high chancellor, and the archbishop of York, with the assistance of the vicars-general of the said two archbishops, and of one of the masters of the High Court of Chancery, to be selected for that purpose by the lord high chancellor, shall ordain and establish tables of fees, and shall have power from time to time to amend or alter such tables of fees, to be taken in respect of donation, presentation, nomination, collation, institution, installation, induction, or licence, or any instrument, matter, or thing connected with the admission of any spiritual person to any cathedral preferment or any benefice throughout England and Wales, by any officer, secretary, clerk, or minister to whom belong the duties of preparing, sealing, transacting or doing any of such instruments, matters, and things; and before the fees contained in such tables or such amended tables shall be demanded, taken, or received by any of the said persons, such tables or amended tables shall be submitted to her Majesty's privy council, who may disallow the same or any part thereof; and notice shall be given in the London Gazette, of such submission to the privy council; and if within the space of three months from the time of giving such notice the same shall not be disallowed, such fees, or such parts thereof as shall not be disallowed, shall from and after the expiration of the said three months be deemed and taken to be lawful fees, and thenceforward such fees, and none others, save only such as may be altered or subsequently ordained, as before provided, shall be demanded, taken, or received by any of such officers, secretaries, clerks, or ministers respectively, under any colour or pretence whatsoever: provided always, that the said persons shall not ordain or establish any fees exceeding the fee which for the twenty years next preceding the passing of this act shall have been usually taken for or in respect of the same instrument, matter, or thing, in case of admission to any cathedral preferment or any benefice within the diocese of London; provided also, that the said persons shall have power to ordain graduated scales of fees in respect of benefices below the yearly value of five hundred pounds."

[See *ante*, under "6. Curates of Non-Residents," the curate's fee for licence.—ED.]

III. Residence of Bishops.

Residence of Bishops.

Bishops, (as was observed before), are not punishable by the statute of the 21 Hen. 8, for non-residence upon their bishoprics; but although an archbishop or bishop be not tied to be resident upon his bishopric by the statutes, yet they are thereto obliged by the ecclesiastical law, and may be compelled to keep residence by ecclesiastical censures (p).

(o) [And title *Benefice*, vol. i. p. 156.] (p) Wats. c. 37.

Thus, by a constitution of Archbishop Langton, "Bishops shall be careful to reside in their cathedrals on some of the greater feasts, and at least in some part of Lent, as they shall see to be expedient for the welfare of their souls (*q*)."

And by a constitution of Otho, "What is incumbent upon the venerable fathers the archbishops and bishops by their office to be done, their name of dignity, which is that of bishop (*episcopus*), or superintendent, evidently expresseth. For it properly concerns them (according to the gospel expression) to watch over their flock by night. And since they ought to be a pattern by which they who are subject to them ought to reform themselves, which cannot be done unless they show them an example, we exhort them in the Lord, and admonish them, that residing at their cathedral churches, they celebrate proper masses on the principal feast-days, and in Lent, and in Advent. And they shall go about their dioceses at proper seasons, correcting and reforming their churches, consecrating and sowing the word of life in the Lord's field. For the better performance of all which, they shall twice in the year, to wit, in Advent and in Lent, cause to be read unto them the profession which they made at their consecration (*r*)."

And by a constitution of Othobon, "Although bishops know themselves bound as well by divine as ecclesiastical precepts to personal residence with the flock of God committed to them, yet because there are some who do not seem to attend hereunto, therefore we, pursuing the monition of Otho the legate, do earnestly exhort them in the Lord, and admonish them in virtue of their holy obedience, and under attestation of the divine judgments, that out of care to their flock, and for the solace of the churches espoused to them, they be duly present, especially on solemn days in Lent and in Advent, unless their absence on such days shall be required for just cause by their superiors (*s*)."

IV. *Residence of Deans and Canons.*

Can. 42. "Every dean, master, or warden, or chief governor of any cathedral or collegiate church, shall be resident in the same fourscore and ten days *conjunctim* or *divisim* in every year at the least, and then shall continue there in preaching the word of God, and keeping good hospitality; except he shall be otherwise let with weighty and urgent causes to be approved by the bishop of the diocese, or in any other lawful sort dispensed with." OF DEANS.

To be approved by the Bishop.—By the ancient canon law, personal attendance on the bishop, or study in the university, was a just cause of non-residence; and, as such, notwith-

(*q*) Lind. 130.

(*r*) Athon, 55.

(*s*) Athon, 118.

standing the non-residence, entitled them to all profits, except *quotidians* (t).

Of Prebendaries and Canons, and Archdeacons endowed with Canonries.

Can. 44. "No prebendaries nor canons in cathedral or collegiate churches, having one or more benefices with cure, (and not being residentiaries in the same cathedral or collegiate churches), shall, under colour of their said prebends, absent themselves from their benefices with cure above the space of one month in the year, unless it be for some urgent cause, and certain time to be allowed by the bishop of the diocese. And such of the said canons and prebendaries, as by the ordinances of the cathedral or collegiate churches do stand bound to be resident in the same, shall so among themselves sort and proportion the times of the year, concerning residence to be kept in the said churches, as that some of them always shall be personally resident there; and all those who be, or shall be residentiaries in any cathedral or collegiate church, shall, after the days of their residency appointed by their local statutes or custom expired, presently repair to their benefices, or some one of them, or to some other charge where the law requireth their presence, there to discharge their duties according to the laws in that case provided. And the bishop of the diocese shall see the same to be duly performed and put in execution."

[The 3 & 4 Vict. c. 113, has the following provision on this subject:—

Residence of Dean and Canons.

[Sect. 3. "That in every cathedral and collegiate church the term of residence to be kept by every dean thereof hereafter appointed, shall be eight months at the least in every year: and the term of residence to be kept by every canon thereof hereafter appointed, shall be three months at the least in every year."

[See this statute under the title *Deans and Chapters* (u).

[It further provides for the term of residence to be kept by archdeacons endowed or augmented under the act, as follows:

Provision for Archdeacons.

[Sect. 34. "That, so soon as conveniently may be, and by the authority hereinafter provided, subject to the consent of the bishop, any archdeaconry may be endowed by the annexation either of an entire canonry or of a canonry charged with the payment of such portion of its income as shall be determined on towards providing for another archdeacon in the same diocese, or with such last-mentioned portion of the income of a canonry, or by augmentation out of the common fund hereinafter mentioned, provided that the said augmentation shall not be such as to raise the average annual income of any archdeaconry to an amount exceeding two hundred pounds; and that no canonry shall be so charged with the payment of a portion of the income thereof to any archdeacon, unless the average annual income of such canonry, after the payment of such portion as aforesaid, shall amount to or exceed five hundred pounds: provided always, that no archdeacon shall be entitled to hold any endowment or augmentation or other emolument, as such archdeacon.

(t) Gibs. 172.

(u) [Vol. ii. p. 125, of this work.]

con, under the provisions of this act, unless he shall be resident for the space of eight months in every year within the diocese in which his archdeaconry is situate, or as to any present archdeacon, within the diocese in which his archdeaconry was situate before the passing of the first-recited act, subject to the same provisions as to licences for non-residence which are enacted with respect to incumbents with benefices by an act passed in the second year of her present Majesty, intituled ‘An Act to abridge the holding of Benefices in Plurality, and to make better Provision for the Residence of the Clergy.’”—ED.]

So that, besides the general laws directing the residence of other clergymen, these dignitaries have another law peculiar to themselves, namely, the local statutes of their respective foundations, the validity of which local statutes this canon supposeth and affirmeth. And with respect to the new foundations in particular, the act of parliament of the 6 Anne, c. 21, enacteth, that their local statutes shall be in force so far as they are not contrary to the constitution of the Church of England, or the laws of the land. This canon is undoubtedly a part of the constitution of the church; so that if the canon interfereth in any respect with the said local statutes, the canon is to be preferred, and the local statutes to be in force only so far forth as they are modified and regulated by the canon.

[Residence-Houses.]

I. <i>Of Parochial Incumbents</i> . . . 513	III. <i>Of Bishops</i> 539
II. <i>Of Deans and Canons</i> . . . 539	

I. *Of Parochial Incumbents.*

1. <i>Remarks on Statutes relating to</i> 513	<i>dies to lend Money on Mortgage</i> 525
2. <i>Building by Mortgage, under 17 Geo. 3, c. 53</i> 514	7. <i>Consent of Patrons and the Crown</i> 527
3. <i>— under 1 & 2 Vict. c. 106</i> 517	8. <i>Money recovered for Dilapidations</i> 529
4. <i>Repayment of Principal and Interest before 1 Vict. c. 23</i> 521	9. <i>Purchase—Sale—Exchange of Residence-Houses</i> . . . 530
5. <i>— since 1 Vict. c. 23</i> . . . 523	10. <i>Grants of Land or Money for Residence-Houses</i> . . . 535
6. <i>Powers of Queen Anne's Bounty and Corporate Bo-</i>	

1. *Remarks on Statutes relating to.*

[SINCE the seventeenth year of the reign of George III. several statutes have been passed having for their immediate object to provide proper houses of residence for the clergy. It may be useful to enumerate these acts before entering into a consider-

ation of their contents:—1. The 17 Geo. 3, c. 53; 2. The 21 Geo. 3, c. 66, explaining and amending a clause in the preceding act; 3. The 7 Geo. 4, c. 66, appointing certain persons and bodies, previously disabled, to sell messuages, &c.; 4. The 1 & 2 Vict. c. 23, extending the provisions of the two former statutes; 5. The 1 & 2 Vict. c. 29, supplying an omission in section 7 of the foregoing act. These statutes legalize the exchange and sale of residence-houses, and the grant of houses, lands or money, under certain limitations, for the purpose of procuring residence-houses, but they relate chiefly to the *power of the incumbent* to raise money by mortgage for building or repairing a residence-house on his living, though the 17 Geo. 3, c. 53, also empowers the ordinary, under certain circumstances, to compel an incumbent to avail himself of the provisions of the act. 6. But the last enactment on this subject, 1 & 2 Vict. c. 106, not only empowers, but *requires the bishop* to enforce its provisions. Indeed throughout this statute the single authority of the bishop is substituted for that of the ordinary, patron, and incumbent, in the former acts. These two last statutes altered the mode of payment both of the principal and the interest of mortgages contracted subsequent to their enactment.

[2. *Building by Mortgage, under 17 Geo. 3, c. 53.*

Incumbent of
any ecclesiastical
Living,
whereon
there is no
House, &c.

[“‘ WHEREAS many of the parochial clergy, for want of proper habitations, are induced to reside at a distance from their benefices, by which means the parishioners lose the advantage of their instruction and hospitality, which were great objects in the original distribution of tithes and glebes for the endowment of churches:’ For remedy whereof, may it please your majesty that it may be enacted; and be it enacted, &c. That from and after the twenty-fourth day of June, one thousand seven hundred and seventy-seven, whenever the parson, vicar, or other incumbent, of any ecclesiastical living, parochial benefice, chapelry, or perpetual curacy, being under the jurisdiction of the bishop or other ecclesiastical ordinary, whereon there is no house of habitation, or such house is become so ruinous and decayed, or is so mean, that one year’s net income and produce of such living will not be sufficient to build, rebuild, or put the same, with the necessary offices belonging thereto, in sufficient repair, shall think fit to apply for the aid and assistance intended to be given by this act, it shall and may be lawful for every such parson, vicar, or incumbent (after having procured, from some skilful and experienced workman or surveyor, a certificate, containing a state of the condition of the buildings on their respective glebes, and of the value of the timber and other materials thereupon, fit to be employed in such buildings or repairs, or to be sold, and also a plan and estimate of the work proposed to be done (such state and estimate to be verified upon oath, taken before some justice of the peace, or master in chancery, ordinary or extraordinary), and laid the same, together with a just and particular account in writing, signed by him, and verified upon oath, taken as afore-

said, of the annual profits of such living, before the ordinary and patron of the living, and obtained their consent to such proposed new buildings or repairs, by writing under their respective hands, in the form for that purpose contained in the schedule hereunto annexed), to borrow and take up at interest, in the manner hereafter mentioned, such sum or sums of money as the said estimate shall amount unto, after deducting the value of timber or other materials which may be thought proper to be sold, not exceeding two years net income and produce of such living, after deducting all rents, stipends, taxes, and other outgoings, excepting only the salaries to the assistant curate, where such a curate is necessary; and as a security for the money so to be borrowed, to mortgage the glebe, tithes, rents, and other profits and emoluments, arising or to arise from such living, to such person or persons who shall advance the same, by one or more deed or deeds, for the term of twenty-five years, or until the money so to be borrowed, with interest for the same, and such costs and charges as may attend the recovery thereof, shall be fully paid and satisfied, according to the terms, conditions, true intent and meaning of this act; which mortgage deed or deeds shall be made in the forms or to the effect for that purpose contained in the said schedule, and shall bind every succeeding parson, vicar, or incumbent, of such living, until the principal and interest, costs and charges, shall be paid off and discharged, as fully and effectually as if such successor had executed the same.

[Sect. 2. "That every such mortgagee shall execute a counterpart of every such mortgage, to be kept by the incumbent for the time being; and a copy of every such deed of mortgage shall be registered in the office of the registrar of the bishop of the diocese where the parish lies, or other ordinary having episcopal jurisdiction therein for the time being, after having been first examined by him with the original; which officer shall register the same, and be entitled to demand and receive the sum of five shillings, and no more, for such register; and every such deed shall be referred to upon all necessary occasions, the person inspecting the same paying one shilling for every such search; and the said deed, or a copy thereof, certified under the hand of the registrar, shall be allowed as legal evidence, in case any such mortgage deed shall happen to be lost or destroyed."

[This section is transcribed verbatim into sect. 64 of 1 & 2 Vict. c. 106, with this difference, that in place of the words "in the office of the registrar," down to "jurisdiction therein," are inserted the words "in the office of the bishop of the diocese," there being a provision in this latter act that no peculiars shall be exempt from its operation.

[Sect. 4. "That the money so to be borrowed shall be paid into the hands of such person or persons as shall be nominated and appointed to receive and apply the same for the purposes aforesaid, by the ordinary, patron, and incumbent, by writing under their respective hands, in the form for that purpose contained in the said schedule, after such nominee shall have given a bond to the ordinary, with sufficient surety, in double the sum so to be borrowed or

17 Geo. 3,
c. 53.
*Building by
Mortgage.*

(with the
Consent of
the Ordinary
and Patron)
may borrow
Money to
build one,

and mortgage
the Glebe,
Tithes, &c. for
twenty-five
Years.

Every Mort-
gagee to
execute a
Counterpart
of the Mort-
gage, to be
kept by the
Incumbent,
&c.

Money bor-
rowed to be
paid to such
Persons as
the Ordinary,
&c. shall ap-
point;

17 Geo. 3,
c. 53.
*Building by
Mortgage.*

who shall con-
tract for the
Buildings, &c.
and see the
same execu-
ted, and pay
for them, &c.

How the
Balance re-
maining shall
be disposed
of.

Ordinary to
cause Inquiry
to be made
of the Con-
dition of the
Buildings
when the
Incumbent
entered on
the Living,
&c.

raised, with condition of his duly applying and accounting for the same according to the directions of this act; and the receipt of the person or persons so to be nominated shall be a sufficient discharge to the person or persons who shall advance and pay the money: And the person or persons, so to be nominated, shall enter into contracts with proper persons for such buildings or repairs as shall be approved by the ordinary, patron, and incumbent, and shall be specified in an instrument written upon parchment, and signed by them, in the form for that purpose contained in the said schedule; and shall inspect and have the care of the execution of such contracts, and shall pay the money for such buildings and repairs, according to the terms of such agreements, and shall take proper receipts and vouchers for the same; and as soon as such buildings or repairs shall be completed, and the money paid, shall make out an account of his receipts and payments, together with the vouchers for the same, and enter them in a book, fairly written, which shall be signed by him, and laid before the ordinary, patron, and incumbent, and examined by them; and when allowed, by writing under their respective hands, in the form for that purpose contained in the said schedule, such allowance shall be a full discharge to the person so nominated, in respect to the said accounts; and if any balance shall remain in the hands of such nominee or nominees, the same shall be laid out in some further lasting improvements in building upon such glebe, or shall be paid and applied in discharge of so much of the said principal debt as such balance will extend to pay, at the discretion of the said ordinary, patron, and incumbent, or two of them, of which the said ordinary to be one, by order signed by them, in the form for that purpose contained in the said schedule; and an account shall also be kept, made out, and allowed, of such further disbursements, in manner aforesaid: All which accounts, when made out, completed, and allowed, shall be deposited, with the vouchers, in the hands of the said registrar, and kept by him for the use and benefit of the incumbents of such living for the time being, who shall have a right to inspect the same whenever occasion shall require, paying to such registrar, or deputy registrar, the sum of one shilling for every such inspection."

[Sect. 66 of 1 & 2 Vict. c. 106, contains an exact transcript of this provision, except, as has been already remarked, that "bishop" in the latter stands throughout in the place of "ordinary, patron, and incumbent," in the former act; and that after the words "terms of such agreement," it inserts "and also the expenses of preparing the mortgage deed, and incident thereto, and making such certificate, plan, estimate, and copies thereof as aforesaid."

[Sect. 5. "Provided always, that every such ordinary, before he or they shall signify his or their consent, in manner aforesaid, shall cause an inquiry to be made, and certified to him or them by the archdeacon, chancellor of the diocese, or other proper persons living in or near the parish where such buildings are proposed to be made or repaired, in the forms for that purpose specified in the said schedule, of the state and condition of such buildings at the time the incumbent entered upon such living or benefice, how long such

incumbent had enjoyed such living or benefice, what money he had received, or may be entitled to receive, for dilapidations, and how and in what manner he had laid out what he had so received; and if it shall appear to them that such incumbent had, by wilful negligence, suffered such buildings to go out of repair, then to certify the same to the said ordinary, and also the amount of the damage which such buildings had sustained by the wilful neglect of such incumbent; and such incumbent, if the ordinary require it, shall pay the same into the hands of the nominee or nominees to be appointed under the authority of this act, towards defraying the expenses of building or repairs, before the ordinary shall give his consent as aforesaid."

17 Geo. 3,
c. 53.
*Building by
Mortgage.*

[Sect. 8. "That where there shall be no house of habitation upon any ecclesiastical living or benefice, so described as aforesaid, exceeding in clear yearly value one hundred pounds per annum, or being one, the same shall be so mean, or in such a state of decay as aforesaid, and the incumbent shall not reside in the parish twenty weeks within any year, computing the same from the first day of January, it shall be lawful for the ordinary of such living or benefice, with the consent of the patron (in case the incumbent shall not think fit to lay out one year's income, where the same may be sufficient, to put the house and buildings in proper and sufficient repair, or to make such application as aforesaid, for building, repairing, or rebuilding such parsonage house), to procure such plan, estimate, and certificate, as herein directed, and at any time within the course of the succeeding year to proceed in the execution of the several purposes of this act, in such manner as the parson, vicar, or incumbent, is hereby authorized and directed to proceed, and to make and execute such mortgage as aforesaid; which shall be binding upon the incumbent and his successors, and he and they shall be and are hereby made liable to the payment of the interest, principal, and costs; and every such incumbent, and his representatives, shall be and are hereby also made respectively liable to the proportion of the payments for the year which shall be growing at the time of the death of such incumbent, or avoidance of such living, according to the directions aforesaid; which said interest, principal, and costs, and proportion of payments growing at the time of the death of such incumbent or avoidance, shall and may be recovered against such incumbent, his successors or representatives, respectively, by action of debt, in any court of record."

The Ordinary of any Living worth 100*l.* per Annum, which has no proper House of Habitation, may (if the Incumbent neglect to make Application, &c.) procure an Estimate, &c. and proceed in the Execution of this Act, in such Manner as the Parson is directed to proceed.

[3. *Building by Mortgage under 1 & 2 Vict. c. 106.*

[1 & 2 Vict. c. 106, enacts as follows:—

[Sect. 62. "And be it enacted, that upon or at any time after the avoidance of any benefice it shall be lawful for the bishop, and he is hereby required to issue a commission to four beneficed clergymen of his diocese, or if the benefice be within his peculiar jurisdiction, but locally situate in another diocese, then to four beneficed clergymen of such last-mentioned diocese, one of whom shall be the rural dean (if any) of the rural deanery or district wherein such benefice shall be situate, directing them to inquire whether there is a fit house of residence within such benefice, and what are the annual profits of

On Avoidance of Benefice not having fit House of Residence, Bishop to raise Money to build one by Mortgage of Glebe, &c. for 35 Years.

1 & 2 Viet.
c. 106.
*Building by
Mortgage.*

such benefice, and if the clear annual profits of such benefice exceed one hundred pounds, whether a fit house of residence can be conveniently provided on the glebe of such benefice, or otherwise; and if the said commissioners, or any three of them, shall report in writing under their hands to the said bishop that there is no fit house of residence within such benefice, and that the clear annual profits of such benefice exceed one hundred pounds, and that a fit house of residence can be conveniently provided on the glebe of such benefice, or on any land which can be conveniently procured for the site of such house of residence, it shall be lawful for the said bishop, and he is hereby required to procure from some skilful or experienced workman or surveyor a certificate containing a statement of the condition of the buildings (if any), and of the value of the timber and other materials (if any) thereupon fit to be employed in building or repairing or to be sold, and also a plan or estimate of the work fit and proper to be done for building or repairing such house of residence, with all necessary and convenient offices, and thereupon, by mortgage of the glebe, tithes, rents, rent-charges, and other profits and emoluments, arising or to arise from such benefice, to levy and raise such sum or sums as the said estimate shall amount to, after deducting the value of any timber or other materials which may be thought proper to be sold, not exceeding four years net income and produce of such benefice, after deducting all outgoings, (except only the salary of the assistant curate where such a curate is necessary), which mortgage shall be made to the person or persons who shall advance the money so to be levied and raised for the term of thirty-five years, or until the money so to be raised, with interest for the same, and such costs and charges as may attend the recovery thereof, shall be fully paid and satisfied according to the provisions of this act; and the same mortgage shall be made by one or more deed or deeds in the form or to the effect for that purpose contained in the second schedule to this act, and shall bind the incumbent of such benefice for the time being, and his successors, until the principal and interest, costs and charges, shall be fully paid off and satisfied, and every incumbent for the time being, is hereby made liable to the payment of so much of the principal, interest, and costs as under the directions hereinafter contained shall become payable during the time he shall be such incumbent, and every such incumbent and his representatives, shall be and are hereby also made respectively liable to the proportion of the payments for the year which shall be growing at the time of the death of such incumbent or avoidance of such benefice according to the directions hereinafter contained, which said principal, interest, and costs, and the proportion of payment growing at the time of the death of such incumbent or of such avoidance, shall and may be recovered by action of debt in any court of record."

[The schedule is as follows:—

[*“ Form of the Mortgage.*

[*“ This indenture, made the — day of — in the year of our Lord —, between the right reverend father in God, —, lord bishop of — of the one part, and — of the other part: Whereas the said*

bishop, pursuant to the directions of an act passed in the second year of the reign of her Majesty Queen Victoria, intituled ‘*An Act to abridge the holding of Benefices in Plurality, and to make better Provision for the Residence of the Clergy,*’ hath determined to levy and raise the sum of — pounds, to be laid out and expended in building, rebuilding or repairing [as the case shall be], the parsonage house and other necessary offices upon the glebe belonging to the rectory, vicarage, &c. of — [describing it], [or, in purchasing a house and land for the residence and occupation of the incumbent of the rectory, &c.]: And whereas the said — hath agreed to lend and advance the sum of — pounds, upon a mortgage of the glebe, tithes, rent-charges, rents, and other profits and emoluments of the said benefice, pursuant to the directions and the true intent and meaning of the said act. Now this indenture witnesseth, That the said bishop, in consideration of the sum of — pounds, paid at or before the sealing and delivery hereof into the hands of — (a person or persons [as the case shall be] nominated by the said bishop to receive the same, pursuant to the directions of the said act (which nomination is hereunto annexed), and which receipt of the said sum of — pounds the said — have or hath acknowledged by an indorsement on this deed), hath granted, bargained, sold, and demised, and by these presents doth grant, bargain, sell, and demise, unto the said — his executors, administrators, and assigns, all the glebe lands, tithes, rent-charges, rents, moduses, compositions for tithe, salaries, stipends, fees, gratuities, and other profits and emoluments whatsoever, arising, coming, growing, renewing, or payable to the incumbent of the said benefice in respect thereof, with all and every the rights, members, and appurtenances thereunto belonging, to have, hold, receive, take and enjoy the said premises and their appurtenances unto the said — his executors, administrators, and assigns, from henceforth for the term of thirty-five years, fully to be complete and ended: Provided always, that if the incumbent for the time being of the said benefice and his successors shall, from and after the expiration of the first year of the said term, yearly and every year (such year to be computed from the date hereof), pay to the said — his executors, administrators, and assigns, one-thirtieth part of the sum of — pounds, until the whole thereof shall be repaid, and at the end of the first and each succeeding year pay interest at the rate of — per cent. per annum on the said sum of — pounds, or so much thereof as shall from time to time remain unpaid, according to the true intent and meaning of the said act and of these presents, and also all costs and charges which shall be occasioned by the nonpayment thereof, these presents and every thing herein contained shall be void: Provided also, that it shall be lawful for the incumbent for the time being of the said benefice, and his successors, peaceably and quietly to hold and enjoy the said glebe lands, tithes, rent-charges, rents, moduses, compositions for tithes, stipends, fees, gratuities, and other emoluments and profits whatsoever, arising or to arise from or in respect of the said benefice, until default shall be made by him or them respectively in the payment of the interest and principal, or some part thereof, at the times and in the manner aforesaid. In witness, &c.

1 & 2 Vict.
c. 106.
*Building by
Mortgage.*

[“Appointment of the Nominee (to be written on Parchment.)

[“I, the right reverend father in God, —, lord bishop of —, do hereby nominate and appoint — of — to receive the money authorized to be raised by an act passed in the second year of the reign of her

1 & 2 Vict.
c. 106.
*Building by
Mortgage.*

Majesty Queen Victoria, intituled 'An Act to abridge the holding of Benefices in Plurality, and to make better Provision for the Residence of the Clergy,' for the purpose of building, rebuilding, repairing, or purchasing the parsonage-house, &c. [as the case may be], to the rectory, vicarage, &c. of ——— belonging, and to pay and apply the same, and to enter into contracts with proper persons for such buildings or repairs, and to inspect and to take care of the execution of such contracts, and to take such receipts and vouchers, keep such accounts, and do and perform all such other matters and things which nominees are authorized and required to do and perform in and by the said act, the said ——— having given security for the due application thereof, according to the directions of the said act. Given under my hand this ——— day of ———.

[*“Form of the Deed of Purchase of Buildings or Lands to be annexed to the Benefice.*

[*“This indenture, made the ——— day of ——— in the year of our Lord ———, between A. B. of ——— of the one part, the right reverend father in God ———, lord bishop of ——— and E. F. of ——— patron of the rectory, &c. of ——— of the other part: Whereas there is no fit parsonage-house belonging to the said rectory, &c., and whereas a contract hath been made, by the direction of the said bishop, with the said A. B. for the absolute purchase of the house, buildings, and lands hereinafter described, for the price or sum of ——— pounds, pursuant to the directions of an act passed in the second year of the reign of her Majesty Queen Victoria, intituled 'An Act to abridge the holding of Benefices in Plurality, and to make better Provision for the Residence of the Clergy.' Now this indenture witnesseth, That the said A. B., in consideration of the sum of ——— pounds to him in hand paid for the purchase aforesaid, the receipt of which sum the said A. B. hath admitted by an endorsement on the back of this deed, hath granted, bargained, and sold, and by these presents doth grant, bargain, and sell, unto the said E. F. and his heirs, all, &c. [here insert a full description of the buildings or lands so intended to be conveyed, with their and every of their rights, privileges, and appurtenances], to hold unto the said E. F. and his heirs or successors [as the case may be] in trust for the sole use and benefit of the incumbent of the said benefice and his successors, rectors, vicars, &c. [as the case may be], of the said benefice for the time being, for ever. [Usual covenants for title to be added.] In witness, &c.”*

Bishop to
transmit Co-
pies of Re-
port, &c. to
Patron and
Incumbent,
who may ob-
ject within
two months,
and if so,
Bishop may
order Plan to
be modified
or abandoned.

[Sect. 63. “Provided always, and be it enacted, that the said bishop shall cause to be transmitted to the patron and the incumbent (if any) of such benefice, copies of the report so to be made by such commissioners, and of the plan, estimate, and certificate so to be made by such workman, or surveyor, two calendar months at the least before making any such mortgage as aforesaid; and that in case the patron and the incumbent, or either of them, shall object to the proposed site for a residence, or to the proposed plan for erecting or repairing such residence, or to the amount proposed to be raised, and shall deliver such objections in writing to the said bishop before the expiration of such period of two calendar months, the said bishop shall have full power to direct that the plan proposed to be carried into effect shall be altered or modified in such manner as he may think fit: Provided also, that if the bishop

shall, after receiving the report to be made by such commissioners, be of opinion that it is not expedient under the special circumstances of any such benefice, to levy and raise any sum or sums of money by mortgage as hereinbefore required, or otherwise to take measures for providing a fit house of residence for such benefice, he shall state in detail such special circumstances and the grounds of his opinion in the next annual return to be made by him to her Majesty in council, according to the directions hereinbefore contained."

1 & 2 Vict.
c. 106.
*Building by
Mortgage.*

[Section 64 contains a provision as to the counterpart of the mortgage similar, as has been said, to that of 17 Geo. 3, c. 53.

[Sect. 65. "And be it enacted, that whenever the principal and interest directed to be paid to the mortgagee under the provisions of this act shall be in arrear and unpaid for the space of forty days after the same shall become due, it shall be lawful for such mortgagee, his executors, administrators, or assigns, to recover the same, and the costs and charges attending the recovery thereof, by distress and sale in such manner as rents may be recovered by landlords or lessors from their tenants by the laws in being."

On Failure of
Payment of
Principal and
Interest for
40 days after
due, Mort-
gagee may
distrain.

[Section 66 contains provisions, as to the nominees of the bishop for securing the borrowed money, similar, as has been said, to those contained in 17 Geo. 3, c. 53.

[4. *Repayment of Principal and Interest before 1 Vict. c. 23.*

[The 17 Geo. 3, c. 53, provided by sect. 3,

17 Geo. 3,
c. 53.

["That whenever the principal and interest, directed to be paid to the mortgagee under the several provisions of this act, shall be in arrear and unpaid, for the space of forty days after the same shall become due, it shall and may be lawful for such mortgagee, his executors, administrators, or assigns, to recover the same, and the costs and charges attending the recovery thereof, by distress and sale, in such manner as rents may be recovered by landlords or lessors from their tenants by the laws in being."

On failure of
Payment of
Principal and
Interest for
forty Days
after due,
Mortgagee
may distress.

[And by sect. 6,

["That the incumbent of every such living or benefice, in cases where such mortgage or mortgages shall be made as aforesaid, and his successors for the time being, shall, and he and they is and are hereby required to pay the interest arising upon every such mortgage, yearly, as the same shall become due, or within one month after, and also five pounds per centum per annum, of the principal remaining due, by yearly payments; and that every such incumbent who shall not reside twenty weeks (a) in each year upon such living, computing such year from the date of the said mortgage deed, shall, instead of the said sum of five pounds per centum per annum, pay the sum of ten pounds per centum per annum, of the principal remaining due, by yearly payments, such payments to be respectively made at the same time such interest shall be paid, until the whole principal money and interest shall be fully paid and

Directions for
payment of
the Principal
and interest
of the Mort-
gages.
Every In-
cumbent who
shall not re-
side twenty
Weeks in
each Year
upon his
Living, shall
pay 10*l.* per
cent. of the
Principal,
&c.; and
every In-
cumbent
paying only
5*l.* per cent.

(a) [This clause was afterwards mitigated by sect. 6 of 5 Geo. 4, c. 89.—Ed.]

17 Geo. 3,
c. 53.

per ann. of
the Principal,
to produce a
Certificate of
his Resi-
dence, under
the Hands of
two Rectors,
&c.; and, as
soon as the
Buildings are
completed,
to insure
them against
Fire.

discharged; and that every such incumbent who shall pay only five pounds per centum per annum of such principal money, shall, at the time he pays the same, produce and deliver to the mortgagee a certificate under the hands of two rectors, vicars or officiating ministers, of some parishes near adjoining, signifying that he had resided twenty weeks upon the said living or benefice, within the year for which such payment became due, according to the regulations aforesaid; which certificate shall be in the form, or to the effect, contained in the said schedule; and that every such incumbent shall, annually, at his own expense, from the time such buildings, authorized to be made by this act, shall be completed, insure, at one of the public offices established in London or Westminster for insurance of houses and buildings, the house and other buildings upon such glebe, against accidents by fire, at such sum of money as shall be agreed upon by the ordinary, patron, and incumbent; and in default of the payment of either the principal or interest, in manner aforesaid, or neglect of the incumbent to make such insurance, the ordinary shall have power to sequester the profits of the living till such payment or insurance shall be made (b)."

21 Geo. 3,
c. 66.

[This provision was explained and amended by 21 Geo. 3, c. 66, s. 1, which enacted as follows:

The Incum-
bent of every
Living,
whereof the
Glebes, &c.
have been
or shall be
mortgaged for
the purposes
of the recited
Act, shall pay
to the Mort-
gagee, be-
sides Interest,
5 per cent.
per ann. of
the Principal,
if resident,
or 10 per
cent. if non-
resident.

["That the incumbent of every living or benefice of which the glebes, tithes, rents, and profits, have been or shall be mortgaged for the purposes of the said act, shall, from and after the passing of this act, well and truly pay, or cause to be paid, to every such mortgagee, over and besides the interest of the principal money due upon such mortgage, the sum of five pounds per centum per annum, if resident, or ten pounds per centum per annum, if non-resident, of the money originally advanced upon such mortgage, until the whole of the said principal money shall be discharged; and if, upon any such mortgage or mortgages already made, less shall have been paid by the present incumbent than what is hereby directed to be paid, he shall, and he is hereby required, within six months after the passing of this act, to make up the deficiency; and in default of payment thereof within the time aforesaid, the same shall be recovered in such and the same manner as the interest is recoverable by virtue of the provisions in the said recited act (c)."

17 Geo. 3,
c. 53.

[And by 17 Geo. 3, c. 53, s. 7,

Clause for
proportioning
the annual
Payment, in
case of Death
or other
Avoidance.

["And, in order that the payment of such year may be justly and equitably ascertained and adjusted, between the successor, and the parson, vicar, or incumbent, avoiding such living or benefice by death or otherwise, or his representatives, in case of death or other avoidance, in such proportions as the profits of such living shall have been received by them respectively, for the year in which such death or avoidance shall happen; be it further enacted, That in case any difference shall arise in adjusting or settling the proportions aforesaid, the same shall be determined by two indifferent persons, the one to be named by the said successor, and the other

(b) [1 & 2 Vict. c. 106, s. 67, contains a similar provision as to insurance.—Ed.]

(c) [5 Geo. 4, c. 89, reciting that

the income of livings was much fallen in value, allowed five per cent. yearly payment of the principal to be made.

Ed.]

by the person making such avoidance, or his representatives, in case of his death; and in case such nominees shall not be appointed within the space of two calendar months next after such death or avoidance, or if they cannot agree in adjusting such proportions within the space of one calendar month after they shall have been appointed, the same shall be determined by some neighbouring clergyman, to be nominated by the ordinary, whose determination shall be final and conclusive between the parties; which nominations and determinations shall be made according to the forms for that purpose contained in the said schedule, as near as conveniently may be."

16 Geo. 3,
c. 53.

[5. *Repayment of Principal and Interest since 1 Vict. c. 23.*

[The 1 Vict. c. 23, recited and amended 17 Geo. 3, c. 53, and 21 Geo. 3, c. 66, but provided by sect. 13,

1 Vict. c.
23.

["That all powers, authorities, provisions, forms, and matters in the said acts contained shall, except as is herein otherwise directed, extend and be applicable, *mutatis mutandis*, to all mortgages and other instruments made, as well under and for the purposes of this act as of the before-mentioned acts, and as if the same had been respectively repeated and set forth herein."

Remaining
Powers of
recited Acts
extended to
this Act.

[This statute enacted, s. 1,

["That from and immediately after the passing of this act it shall be lawful for the incumbent of any benefice to borrow and take up at interest for the purposes of the said acts, and also for the purpose of buying or procuring, if necessary, a proper site for a house and other necessary buildings, or for the purposes of the said acts only, any sum or sums of money not exceeding three years net income of such benefice, and to take all such proceedings as are required in and by the said acts (so far as the same are applicable for that purpose), and, as a security for the money so to be borrowed, to mortgage the glebe, tithe, rent-charges, rents, and other profits and emoluments belonging to such benefice, to such person or persons, corporation or corporations aggregate or sole, as shall lend the same money, by one or more deed or deeds, for the term of thirty-five years, or until the money so to be borrowed, with interest for the same, and such costs and charges as may attend the recovery thereof, shall be fully paid and satisfied, according to the terms and conditions of the said acts (so far as the same are applicable, and not hereby repealed or altered); and that from and after the expiration of the first year of the said term (in which year no part of the principal sum borrowed shall be repayable) the incumbent shall yearly and every year (such year to be computed from the day of the date of the mortgage) pay to the mortgagee one thirtieth part of the said principal sum, until the whole thereof shall be repaid, and shall at the end of the first and each succeeding year pay the yearly interest on the said principal sum, or on so much thereof as shall from time to time remain unpaid, in each case according to the terms and conditions of the said acts, except so far as the same are hereby repealed or altered; and such mortgage deed or deeds shall be made as nearly as may be in the form or to the effect of the form contained in the schedule to the said acts or one of them, and shall bind every succeeding incumbent of

Extension of
theProvisions
of recited
Acts relating
to the repair-
ing and
building of
Houses of
Residence.

1 & 2 Vict.
c. 23.

Repeal of so much as requires Non-residents to pay 10*l.* per cent. per an. of Sum borrowed, &c.

The yearly Instalments of principal Sums secured by existing Mortgages to the Governors of Queen Anne's Bounty reduced.

such benefice until the principal and interest, costs and charges, shall be paid off and discharged, as fully and effectually as if such successor had made and executed the same."

[Sect. 2. "That so much of the said acts as requires the incumbent of a benefice mortgaged under the provisions thereof, if non-resident, to pay ten pounds per centum per annum of the money originally advanced, and obliges an incumbent paying five pounds per centum per annum to produce a certificate of residence, shall be and the same are hereby repealed as to all mortgages to be made after the passing of this act."

[Sect. 3. "That for the future, as to every mortgage which has been made to the governors of the bounty of Queen Anne for the augmentation of the maintenance of the poor clergy, by any bishop, under the powers of an act of parliament specially enabling him, whereby a greater yearly instalment than one thirtieth part of the principal sum is stipulated to be paid, or by the incumbent of a benefice, by virtue of the two before-mentioned acts, the instalment of the principal sum to be paid in every year to the said governors or their assigns by such bishop or by the incumbent (whether such incumbent shall have been resident for the space of twenty weeks in the year for which such instalment shall be payable, or not, and without the production of any certificate of such residence,) shall be one thirtieth part of the principal sum originally advanced on such mortgage, in lieu of the yearly instalment thereby stipulated to be paid, until the whole of the said principal sum shall be fully discharged and paid, such substituted yearly instalment to commence and be paid in each case on the day when the next yearly instalment by virtue of the said mortgage shall become due; and the mortgages made to the said governors of the estates of any bishopric, or of the glebe, tithes, rents, and other profits and emoluments of any benefice, shall in every case be and remain in force as a security for the yearly instalments of the principal by the said mortgages agreed to be paid, as well as for the payment of the interest arising on such mortgages, and with all the powers and remedies for enforcing the same given by the said respective acts, until the money borrowed, and all interest for the same, and also all costs and charges which shall be occasioned by the nonpayment thereof, shall be fully paid and discharged, in like manner as if such substituted yearly instalments had been expressly mentioned in and secured by the said mortgages, the expiration of the term of years granted by the said mortgages, or any other cause or matter whatsoever, notwithstanding."

[See below as to the power of Queen Anne's bounty and corporate bodies to borrow money on mortgage for the purposes of these acts.

1 & 2 Vict.
c. 106.

Directions for payment of Principal and Interest of the Mortgages.

[The 1 & 2 Vict. c. 106, s. 67, enacts,

["That the incumbent of every such benefice, in cases where such mortgage or mortgages shall be made as aforesaid, and his successors for the time being, shall, from and after the expiration of the first year of the said term (in which year no part of the principal sum borrowed shall be repayable), yearly and every year (such year to be computed from the date of such mortgage) pay to

the mortgagee one thirtieth part of the principal sum until the whole thereof shall be repaid, and shall at the end of the first and each succeeding year pay the yearly interest on the principal sum, or so much thereof as shall from time to time remain unpaid; and that every such incumbent shall annually, at his own expense, from the time such buildings authorized to be made by this act shall be completed, insure, at one of the public offices established in London or Westminster for insurance of houses and buildings, the house and other buildings upon such glebe against accidents by fire, at such sum of money as shall be determined upon by the bishop; and in default of the payment of either the principal or interest in manner aforesaid, or neglect of the incumbent to make such insurance, the bishop shall have power to sequester the profits of the benefice till such payment or insurance shall be made."

1 & 2 Vict.
c. 106.

As soon as
the Buildings
are com-
pleted, In-
cumbent to
insure them
against Fire.

[Section 68 contains provisions for the apportionment of the annual payment in cases of death, or other avoidance, similar to those mentioned above of 17 Geo. 3, c. 53.]

[6. *Powers of Governors of Queen Anne's Bounty, and of Corporate Bodies, to lend Money on Mortgage.*]

[The 17 Geo. 3, c. 53, enacts by section 16,

17 Geo. 3,
c. 53.

["That in all cases where any act is required to be done by the ordinary, in the execution of any of the purposes of this act, and such ordinary shall be a body corporate aggregate, every such act shall be done and signified under the seal of such body corporate."]

Proviso when
the Ordinary
shall be a
Body Cor-
porate, &c.

[And by section 12,

"That it shall and may be lawful for the governors authorized or appointed to regulate and superintend the bounty given by her late majesty Queen Anne for the augmentation of the maintenance of the poor clergy, to advance and lend any sum or sums of money, not exceeding the sum of one hundred pounds, in respect of each living or benefice, out of the money which has arisen, or shall from time to time arise, from that bounty, for promoting and assisting the several purposes of this act, with respect to any such livings or benefices as shall not exceed the clear annual improved value of fifty pounds; and such mortgage and security shall be made for the repayment of the principal sums so to be advanced, as are hereinbefore mentioned, but no interest shall be paid for the same; and in cases where the annual value of such living or benefice shall exceed the sum of fifty pounds, that it shall and may be lawful for the said governors to advance and lend, for the purposes of this act, any sum not exceeding two years' income of such living or benefice upon such mortgage and security as aforesaid, and subject to the several regulations of this act, and to receive interest for the same, not exceeding four pounds for one hundred pounds by the year."

Governors of
Queen Anne's
Bounty em-
powered to
lend certain
Sums to pro-
mote the Ex-
ecution of
this Act.

[The 1 & 2 Vict. c. 23, enacts by section 4,

1 & 2 Vict.
c. 23.

["That it shall be lawful for the said governors to advance and lend any sum or sums of money not exceeding the sum of one

Governors of
Queen Anne's

1 & 2 Vict.
c. 23.

Bounty may
advance 100l.
for Benefices
not exceed-
ing 50l. a
Year, with-
out Interest.

hundred pounds in respect of each benefice, out of the money which has arisen or shall from time to time arise from the said bounty for promoting and assisting the several purposes of the said acts and of this act, with respect to any such benefices as shall not exceed the clear annual improved value of fifty pounds, and such mortgage and security shall be made for the repayment of the principal sums so to be advanced as are hereinbefore mentioned, but no interest shall be paid for the same; and in cases where the annual value of such benefice shall exceed the sum of fifty pounds, that it shall and may be lawful for the said governors to advance and lend for the same purposes any sum or sums of money to the extent authorized by this act to be borrowed, upon such mortgage and security as aforesaid, and subject to the several regulations of this act, and to receive interest for the same not exceeding four pounds for one hundred pounds by the year."

1 & 2 Vict.
c. 106.

Governors of
Queen Anne's
Bounty em-
powered to
lend certain
Sums to pro-
mote the Ex-
ecution of
this Act.

[And the 1 & 2 Vict. c. 106, enacts,

[Sect. 72. "That it shall be lawful for the governors authorized or appointed to regulate and superintend the bounty given by her late majesty Queen Anne, for the augmentation of the maintenance of the poor clergy, to advance and lend out of the money which has arisen or shall from time to time arise from that bounty, for promoting and assisting the purposes of this act, any sum not exceeding the amount hereby authorized to be raised upon such mortgage and security as aforesaid, and subject to the several regulations of this act, and to receive interest for the same not exceeding four pounds for one hundred pounds by the year."

17 Geo. 3,
c. 53.

Colleges in
Oxford and
Cambridge
and other
Corporate
Bodies, Pa-
trons of Liv-
ings, may
lend any
Sums with-
out Interest,
to aid the
Execution of
this Act.

[The 17 Geo. 3, c. 53, enacts,

[Sect. 13. "That it shall and may be lawful for any college or hall, within the universities of Oxford and Cambridge, or for any other corporate bodies possessed of the patronage of ecclesiastical livings or benefices, to advance and lend any sum or sums of money, of which they have the power of disposing, in order to aid and assist the several purposes of this act, for the building, rebuilding, repairing, or purchasing of any houses or buildings for the habitation and convenience of the clergy, upon livings or benefices under the patronage of such college or hall, upon the mortgage and security directed by this act for the repayment of the principal, without taking any interest for the same."

1 & 2 Vict.
c. 23.

Colleges, &c.
may advance
Money, In-
terest free,
to Benefices
in their Pa-
tronage for
Houses.

[The 1 & 2 Vict. c. 23, enacts,

[Sect. 5. "That it shall be lawful for any college or hall within the universities of Oxford or Cambridge, or for any other corporate bodies possessed of the patronage of ecclesiastical benefices, to advance and lend any sum or sums of money of which they have the power of disposing in order to aid and assist the several purposes of this act, for the building, rebuilding, repairing, or purchasing of any houses or buildings for the habitation or convenience of the clergy, or sites for such houses and buildings, upon benefices in the patronage of such colleges or halls respectively, upon the mortgage and security directed by this act for the repayment of the principal, without taking any interest for the same."

[And the 1 & 2 Vict. c. 106, enacts,

1 & 2 Vict.
c. 106.

[Sect. 73. "That it shall be lawful for any college or hall within the universities of Oxford and Cambridge, or for any other corporate bodies possessed of the patronage of ecclesiastical benefices, to advance and lend any sum or sums of money of which they have the power of disposing in order to aid and assist the several purposes of this act for the building, rebuilding, repairing, or purchasing of any houses or buildings for the habitation and convenience of the clergy, upon benefices under the patronage of such college or hall, upon the mortgage and security directed by this act for the repayment of the principal, without taking any interest for the same."

Colleges in Oxford, &c. may lend any Sums without Interest, to aid the Execution of this Act.

[Sect. 74. "That it shall be lawful for the said bishop, by writing under his hand, to make such allowance to the person or persons to be nominated by him for the purpose of paying and applying the money so to be raised as aforesaid as he shall think fit, not exceeding the sum of five pounds for every one hundred pounds so to be laid out and expended as aforesaid."

Allowance to Persons nominated by the Bishop to apply Money.

[7. *Consent of Patrons and the Crown to executing the Provisions of these Statutes.*

[The 17 Geo. 3, c. 53, enacts,

17 Geo. 3,
c. 53.

[Sect. 14. "That whenever the patron of any living or benefice, to which the provisions of this act are proposed to be extended, shall happen to be a minor, idiot, lunatic, or *feme covert*, it shall and may be lawful for the guardian, committee, or husband of every such patron, to transact the several matters aforesaid for such patron, who shall be bound thereby, in such manner as if he or she had been of full age, of sound mind, or *feme sole*, and had done such act, or given his or her consent thereto."

Who is to act for any Patron who shall be a Minor, Lunatic, &c.

[Section 15 provides that such writings shall not be liable to stamp duty.

[Sect. 17. "Provided always, that where the incumbent of any chapelry or perpetual cure shall be nominated by the rector or vicar of the parish wherein the same is situated, in every such case the consent of such rector or vicar, together with the consent of the patron of such rectory, shall be necessary in all such matters wherein the consent of the patron is required by the former provisions of this act."

In certain Cases the Consent of the Rector, &c. necessary.

[Sect. 19. "Provided also, that it shall and may be lawful for the patron, ordinary, and incumbent of any such living or benefice as aforesaid, or any two of them, of which the ordinary to be one, by writing under their hands, to make such allowance to the person or persons to be nominated by them, for the purpose of paying and applying the money so to be raised as aforesaid, as they shall think fit, not exceeding the sum of five pounds for every one hundred pounds so to be laid out and expended as aforesaid."

Patron, &c. to make Allowance to Persons for applying the Money, &c.

[The 1 & 2 Vict. c. 23, enacts,

1 & 2 Vict.
c. 23.

[Sect. 12. "That in any case in which the consent of the patron of any benefice shall be required to the exercise of any power given by this act, and the patron of such benefice shall be a minor, idiot, lunatic, or *feme covert*, it shall be lawful for the guardian or guar-

How Consent to be given where Patron is an incapacitated Person.

1 & 2 Vict.
c. 23.

dians, committee or committees, or husband of such patron (but in case of a *feme covert* with her consent in writing) to execute the instrument by which such power shall be exercised in testimony of the consent of such patron; and such execution shall for the purposes of this act be deemed and taken to be an execution by the patron of the benefice."

17 Geo. 3,
c. 53.

[As to the consent of the Crown, the 17 Geo. 3, c. 53, enacts,

In what
Manner the
Consent of
the Crown
shall be made
known, in all
Cases where
the Patron-
age shall be
in the Crown.

[Sect. 20. "Provided also, that in all cases where the patronage of any living or benefice hereinbefore described shall be in the crown, and such living or benefice shall be above the yearly value of twenty pounds in the king's books, the consent of the crown to the several proceedings hereby authorized respecting such living or benefice, shall be signified by the lord high treasurer, or first lord commissioner of the treasury for the time being; but if such living or benefice shall not exceed the value of twenty pounds in the king's books, such consent shall be signified by the lord high chancellor, lord keeper, or commissioners of the great seal for the time being; or if such living or benefice shall be within the patronage of the crown in right of the duchy of Lancaster, then such consent shall be signified by the chancellor of the duchy for the time being, by writing under their respective hands, in the form or to the effect for that purpose contained in the schedule hereunto annexed; and that in all such cases where such deed is hereby required to be executed by the patron as well as the ordinary and incumbent, such deed shall be valid and effectual to all intents and purposes whatsoever, if executed by the ordinary and incumbent only, after such consent shall have been obtained as aforesaid from the said lord high treasurer, first commissioner of the treasury, lord chancellor, lord keeper, lords commissioners of the great seal, or chancellor of the duchy of Lancaster respectively, as the case shall be, provided such consent shall be registered at the register office aforesaid."

1 & 2 Vict.
c. 23.

[And the 1 & 2 Vict. c. 23, contains further provisions on this subject:

How Con-
sent of Pa-
tron to be
testified when
Patronage in
the Crown.

[Sect. 10. "That in any case in which the consent of the patron of any benefice shall be required to the exercise of any power given by this act, and the patronage of such benefice shall be in the crown, the consent of the crown to the exercise of such power shall be testified in the manner hereinafter mentioned; (that is to say,) if such benefice shall be above the yearly value of twenty pounds in the queen's books, the instrument by which the power shall be exercised shall be executed by the lord high treasurer or first lord commissioner of the treasury for the time being; and if such benefice shall not exceed the yearly value of twenty pounds in the queen's books, such instrument shall be executed by the lord high chancellor, lord keeper or lords commissioners of the great seal for the time being; and if such benefice shall be within the patronage of the crown in right of the duchy of Lancaster, such instrument shall be executed by the chancellor of the said duchy for the time being; and the execution of such instrument by such person or persons shall be deemed and taken for the purposes of this act to be an execution by the patron of the benefice."

[Sect. 11. "That in any case in which the consent of the patron of any benefice shall be required to the exercise of any power given by the said acts or by this act, and the advowson and right of patronage of such benefice shall be part of the possessions of the duchy of Cornwall, the consent of the patron of such benefice to the exercise of such power shall be testified in the manner hereinafter mentioned; (that is to say,) the instrument by which the power shall be exercised shall be executed by the Duke of Cornwall for the time being, if of full age; but if such benefice shall be within the patronage of the crown in right of the duchy of Cornwall, such instrument shall be executed by the same person or persons who is or are by the said acts authorized to testify the consent of the crown to the exercise of any power given thereby in respect of any benefice in the patronage of the crown; and the execution of such instrument by such person or persons shall be deemed and taken, for the purposes of the said acts and of this act, to be an execution by the patron of the benefice."

How Consent to be given when Patronage is attached to the Duchy of Cornwall.

[For the provisions of 1 & 2 Vict. c. 106, on this subject, extending from section 125 to 128, see the preceding title *Residence*. See also the head of this chapter, "9. *Purchase, Sale, &c.*"]

[8. *Money recovered for Dilapidations.*

[It has been seen under the head "*Building by Mortgage, under 17 Geo. 3, c. 53,*" that by sect. 8 of that act the ordinary had power, under certain circumstances, to compel the incumbent to build or repair by mortgage. By sect. 9, it is enacted:

["That all sum and sums of money recovered or received, by suit or compositions, from the representatives of any former incumbent of such living or benefice, and not laid out in the repairs of such buildings, shall go and be applied in part of the payments under such estimate as aforesaid; and that all money thereafter to be recovered or received, in case the same cannot be had before such buildings are completed, and the money paid for the same shall be applied, as soon as received, in payment of the principal then due, as far as the same will extend: or in case the said mortgage money shall have been discharged, all such money arising from dilapidations shall be paid into the hands of the nominee to be appointed as aforesaid, or of some other person or persons to be nominated by the ordinary, patron, and incumbent, in case such nominee shall be dead, or shall decline to act therein, to be laid out and expended in making some additional buildings or improvements upon the glebe of such living or benefice, to be approved by the ordinary, patron, and incumbent; and in the mean time, or in case such buildings shall not be necessary, then in trust, to lay out the same in government or other good securities, and pay the interest thereof to the incumbent for the time being."

17 Geo. 3, c. 53.

All Money received for Dilapidations, &c. shall be applied in Part of the Payments under the aforesaid Estimate;

or in making some additional improvements, &c.

[Section 69 of 1 & 2 Vict. c. 106, contains a transcript of this provision, with the exception already noticed of substituting "bishop" for "ordinary, patron, and incumbent."

[9. *Purchase, Sale, or Exchange of Residence Houses.*17 Geo. 3,
c. 53.Where new
Buildings are
necessary for
the Residence
of the Incum-
bent, the Or-
dinary, &c.
may purchase
any conve-
nient House,
within one
Mile of the
Church; and
a certain Por-
tion of Land.

[The 17 Geo. 3, c. 53, enacts,

[Sect. 10. "That where new buildings are necessary to be provided or erected for the habitation and residence of the rector, vicar, or other incumbent, pursuant to the authority hereby given, it shall and may be lawful for the ordinary, patron, and incumbent of every such living or benefice, to contract, or to authorize, if they shall think fit, the person so to be nominated by them as aforesaid, to contract, for the absolute purchase of any house or buildings, in a situation convenient for the habitation and residence of the rector or vicar of such living or benefice, and not at a greater distance than one mile from the church belonging to such living, benefice, or chapelry; and also to contract for any land adjoining or lying convenient to such house or building, or to the house or building belonging to any parochial living or benefice, having no glebe lying near or convenient to the same, not exceeding two acres, if the annual value of such living, to be ascertained as aforesaid, shall be less than one hundred pounds per annum, nor two acres for every one hundred pounds per annum, if of greater value, and to cause the purchase money for such house or buildings to be paid out of the money to arise under the powers and authorities of this act; in all which cases the said buildings and lands shall be conveyed to the patron of such living or benefice, and his heirs, in trust, for the sole use and benefit of the rector, vicar, or other incumbent of such living or benefice for the time being, and their successors, and shall be annexed to such church or chapel, and be enjoyed and go in succession with the same for ever; but no contract so made by the nominee shall be valid, until confirmed by the ordinary, patron, and incumbent, by writing under their hands; and every such purchase deed shall be in the form or to the effect contained in the schedule hereunto annexed, and shall be registered in such manner, and in such office, as the other deeds are hereby directed to be registered."

Purchase-
money for
such Land to
be raised by
Sale, &c. of
Part of the
Glebe or
Tithes.

[Sect. 11. "That when any such land lying near to the parsonage house and buildings belonging to such living or benefice, or to be so purchased or exchanged as aforesaid, shall be thought fit to be taken and used as a convenience for the same, the purchase-money or equivalent for such land shall be raised and had by sale or exchange of some part of the glebe or tithes of such living or benefice, which shall appear to the said ordinary, patron, and incumbent most convenient for that purpose; and every such sale or exchange shall be by deed, in the form or to the effect contained in the schedule hereunto annexed, and registered as hereinbefore directed."

[Section 6 of 55 Geo. 3, c. 147, extended *two* acres into *twenty* (see title *Glebe Lands*, vol. ii. p. 303); it will be seen that there is some difference in the provisions of 1 & 2 Vict. c. 106, on the same subject.

1 & 2 Vict.
c. 106.Where new
Buildings are
necessary for
the Residence
of the Incum-
bent, the

[Sect. 70. "That where new buildings are necessary to be provided for the residence of the incumbent of any benefice exceeding in value one hundred pounds a year, and avoided after the passing of this act, and where such new buildings cannot be conveniently

erected on the glebe of such benefice, it shall be lawful for the bishop to contract, or to authorize, if he shall think fit, the person so to be nominated by him as aforesaid to contract, for the absolute purchase of any house or buildings in a situation convenient for the residence of the incumbent of such benefice, and also to contract for any land adjoining or lying convenient to such house or building, or to contract for any land upon which a fit house of residence can be conveniently built, and to raise the purchase-money for such house or buildings and land adjoining, or for such land upon which a house of residence can be conveniently built, (as the case may be), by mortgage of the glebe, tithes, rents, and other profits and emoluments arising or to arise from such benefice, in the same manner in all respects as is herein-before directed with respect to the mortgage herein-before authorized or directed to be made, which mortgage shall be binding upon the incumbent and his successors, and he and they and their representatives are hereby made liable to the payment of the principal, interest, and costs, in the same manner and to the same extent as herein-before directed with respect to the aforesaid mortgage; and the receipt of such nominee or nominees as aforesaid shall be a sufficient discharge to the person or persons who shall advance or pay the money so to be raised: provided always, that no greater sum shall be charged on any benefice under the authority of this act than four years net income and produce of such benefice (after such deduction as aforesaid)."

Bishop may purchase any conveniently situated House, and a certain Portion of Land.

[Sect. 71. "That the buildings and lands so to be purchased shall be conveyed to the patron of such benefice and his heirs or successors, as the case may be, in trust for the sole use and benefit of the incumbent of such benefice for the time being and his successors, and shall be annexed to such benefice, and be enjoyed and go in succession with the same for ever; but no contract of purchase made by the nominee shall be valid until confirmed by the bishop by writing under his hand; and every such purchase deed shall be in the form or to the effect contained in the schedule hereunto annexed, and shall be registered in such manner and in such office as the other deeds are hereby directed to be registered.

Buildings and Lands to be conveyed to Patron in Trust for the Incumbent for the Time being.

[For the power given by 55 Geo. 3, c. 147, and 56 Geo. 3, c. 52, to exchange or pull down, or cut glebe timber for the house of residence, see title *Glebe Lands*, vol. ii. p. 303. The 1 & 2 Vict. c. 23, which, as has been said, extended the provisions of 17 Geo. 3, c. 53, and 21 Geo. 3, c. 66, enacts,

1 & 2 Vict. c. 23.

[Sect. 6. "That when it shall happen that any existing house and offices belonging to any benefice shall be unfit for the residence of the incumbent thereof, and shall be incapable of being enlarged or repaired so as to be rendered fit for his residence; and it shall be so certified to the bishop of the diocese wherein such benefice shall be situate by some competent surveyor or architect, and that it will be advantageous to the benefice that such house and offices should be suffered to remain, it shall be lawful for such incumbent, with the consent in writing of such bishop (such consent to be registered in the registry of such bishop), to allow such house and offices to remain standing as a dwelling

Old Benefice Houses in certain Cases may be converted into Farming Buildings for the Tenants of the Glebe.

house and offices, or to convert the same into farming buildings for the use and occupation of the occupier or occupiers of the glebe lands belonging to such benefice; and from and after the complete erection or the purchase of a new house and offices to the satisfaction of the bishop of the diocese, such old house and offices shall from thenceforth be used for and converted to the purposes aforesaid; and the house and offices to be so erected or purchased shall from thenceforth to all intents and purposes be deemed and taken to be the residence house of and for such benefice, without the necessity of obtaining any licence or faculty for that purpose."

Power to Incumbent (with Consent of Patron and Ordinary and Archbishop) to sell House of Residence if inconveniently situated, or under special Circumstances.

[Sect. 7. "That where the residence house, gardens, orchard, and appurtenances belonging to any benefice shall be inconveniently situate, or for other good and sufficient reasons it shall be thought advisable to sell and dispose thereof, it shall and may be lawful for the incumbent of such benefice, and he is hereby authorized and empowered, with the consent and approbation of the ordinary and patron thereof, and of the archbishop of the province, to be signified by their executing the deed or conveyance hereby authorized to be made, absolutely to sell and dispose of such house, gardens, orchard, and appurtenances, any or either of them, with any land contiguous thereto not exceeding acres, to any person or persons whomsoever, either altogether or in parcels, and for such sum or sums of money as to such ordinary and patron and archbishop as shall appear fair and reasonable, and upon payment of the purchase money for the same as hereinafter mentioned by deed indented to convey and assure such house, gardens, orchard, land, and appurtenances unto and to the use of the purchaser or purchasers thereof, his or their heirs or assigns, or as he or they shall direct or appoint."

[Another statute (x) was passed, on purpose to fill up this blank, with the word "twelve."

Purchase Monies to be paid to the Governors of Queen Anne's Bounty;

[Sect. 8. "That the monies to arise from such sale or sales as aforesaid shall be paid to the said governors of the bounty of Queen Anne; and that the receipt or receipts of the treasurer for the time being of the said governors shall be and be deemed and taken to be an effectual discharge to the person or persons paying such monies, or for so much thereof as in such receipt or receipts shall be expressed; and after obtaining such receipt or receipts such purchaser or purchasers shall be absolutely discharged from the money for which such receipt or receipts shall be given, and shall not be answerable or accountable for the loss, misapplication, or nonapplication of such monies or any part thereof."

to be applied to buy or build a House for Incumbent's Residence.

[Sect. 9. "That the monies to arise from such sale or sales as aforesaid shall, after payment of all costs, charges, and expenses of such sale or sales, be applied and disposed of by the said governors in or towards the erection or purchase of some other house and offices, or the purchase of an orchard, garden, and appurtenances, or land for the site of a house, any or either of them, together with land contiguous thereto, and not exceeding twelve acres, suitable for the residence and occupation of the incumbent of such benefice, and approved of by the said ordinary and patron, such approval

(x) [1 & 2 Vict. c. 29.]

to be signified under the respective hands of such ordinary and patron, and to be deposited in the registry of such ordinary; and such house shall from thenceforth be deemed and taken to be the house of residence of such benefice for all purposes whatsoever."

[Sect. 14. "That in the case of a purchase as aforesaid the several powers and provisions contained in an act made and passed in the seventh year of the reign of his majesty King George the Fourth, intituled 'An Act to render more effectual the several Acts now in force to promote the Residence of the Parochial Clergy, by making Provision for purchasing Houses and other necessary Buildings for the Use of their Benefices,' shall be and the same are hereby extended to this act for the purposes aforesaid."

In case of a Purchase the Powers of Act 7 Geo. 4, c. 66, to apply.

[This statute of the 7 Geo. 4, c. 66, after reciting the 17 Geo. 3, c. 53, a variety of other statutes, and among them the 55 Geo. 3, c. 147, (see title *Glebe Lands*, vol. ii. p. 303), proceeds to enact:—

[" "And whereas the means of providing houses and buildings for the residence and occupation of the parochial clergy are still in many cases insufficient, by reason that the powers given to owners of houses, buildings and lands, by the said act of the fifty-fifth year of his late majesty's reign, if under any disability or incapacity to convey, authorize the sale of land only, and the exchange only of houses and buildings; and that although power to purchase houses and buildings is given by the said acts of the seventeenth and forty-third years of his late majesty's reign, the owners thereof, if under any such disability or incapacity, are not empowered to sell and convey the same:' Be it therefore enacted, &c. That from and after the passing of this act it shall and may be lawful to and for any owner or owners of any messuages, buildings or lands, which may be purchased under the authority of the said acts of the seventeenth and forty-third and fifty-fifth years of his late majesty's reign, or either of them, whether such owner or owners shall be a corporation sole or aggregate, or tenant or tenants in fee simple or in fee tail, general or special, or for life or lives, and for the guardians, trustees or feoffees for charitable or other uses, husbands or committees of or acting for any such owner or owners as aforesaid, who shall be respectively infants, feme coverts or lunatics, or under any other legal disability, or otherwise disabled to act for themselves, himself or herself, to sell such messuages, buildings and lands, or any of them, for the purposes of the said acts or either of them, and to convey the same in manner hereinafter mentioned; and all messuages, buildings and lands, which shall be purchased under the authority of this act or of the said acts of the seventeenth, forty-third and fifty-fifth years of his late majesty's reign, or either of them, shall be conveyed unto and to the use of the parson, vicar or other incumbent of the benefice, curacy or chapelry, for the residence and occupation of the parson, vicar or other incumbent whereof the same shall be purchased, and shall for ever, from and after the conveyance thereof, be and become annexed to the same benefice, curacy or chapelry, and be holden and enjoyed by the par-

7 Geo. 4, c. 66.

Corporations and Persons under Disability or Incapacity authorized to sell Messuages, Lands, &c. for the Purposes of recited Acts.

7 Geo. 4, c. 66.

Conveyance
to be regis-
tered.Such Mes-
suages, Lands,
&c. to be sur-
veyed, and
the Map and
Valuation ve-
rified on Oath
and pre-
served.Application
of Purchase
Money.

son, vicar or other incumbent thereof, and his successors, accordingly, without any licence or writ of *ad quod damnum*, the statute of mortmain, or any other statute or law to the contrary notwithstanding; and a copy of every such conveyance of any messuage, buildings or lands, the purchase money whereof shall be raised under the powers of the said act of the seventeenth year of his late majesty's reign, shall be registered as by the said act is directed with respect to conveyances thereby authorized.

[Sect. 2. "Provided always, that in every case in which any messuage, buildings or lands shall be sold under the authority of this act, by any owner or owners having any less estate or interest in the same than in fee simple, or by any corporation aggregate or sole, or person or persons under any legal disability, a map and plan thereof, under an actual survey and a valuation thereof, shall be made and taken by some competent surveyor, and verified upon oath to be taken before some justice of the peace, which oath any justice of the peace is hereby authorized to administer; and such map, plan and valuation, and the affidavit verifying the same, shall be annexed to and preserved with the conveyance.

[Sect. 3. "Provided also, that in every case in which a sale and conveyance shall be made under the authority of this act, of any messuages, buildings or lands which shall belong to any corporation aggregate or sole, or tenant in fee tail, general or special, or for life or lives, infant, feme covert, lunatic or person or persons under any other legal disability, or otherwise disabled to act for themselves, himself or herself, the purchase money for the same shall with all convenient speed be paid into the Bank of England or the Bank of Ireland, as the case may be, in the name and with the privity of the accountant-general of the High Court of Chancery of England or Ireland, as the case may be, to be placed to his account *ex parte* the person or persons or corporation who would have been entitled to the rents, issues and profits of such messuages, buildings or lands; to the intent that such money shall be applied or laid out under the direction and with the approbation of the said Court of Chancery of England or Ireland, (to be signified by an order to be made upon a petition to be preferred by or on behalf of the person or persons who would have been entitled to the rents, issues and profits of such messuages, buildings or lands,) in the purchase of the land tax, or towards the payment of any debts or incumbrances affecting the same messuages, buildings or lands, or other lands or hereditaments standing settled to the same or the like uses, or in the purchase of other lands or hereditaments, to be conveyed, settled and made subject to and for and upon such and the like uses, trusts, limitations and dispositions, and in the same manner as the messuages, buildings or lands so purchased as aforesaid stood settled or limited, or such of them as at the time of making such purchase and conveyance shall be existing undetermined and capable of taking effect; and in the meantime and until such purchase shall be made, the said money shall by order of the said Court of Chancery of England or Ireland upon application thereto, be invested by the accountant-general in his name in some one of the public funds of England or Ireland, and the dividends and annual

produce thereof shall from time to time be paid, by order of the said court, to the person or persons who would have been entitled to the rents, issues and profits of the said messuages, buildings or lands, in case no purchase and conveyance thereof had been made under the provisions of this act." 7 Geo. 4, c. 66.

[10. *Grants of Land or Money for Residence-Houses.*

[The 17 Geo. 3, c. 53, enacts—

17 Geo. 3,
c. 53.

[Sect. 21. "That it shall and may be lawful for any archbishop or bishop of any diocese, and also for any ecclesiastical corporation sole or aggregate, being lord or lords of any manor within which there shall be any waste or common lands, parcel of the demesnes of such manor, lying convenient for the house and buildings, and other the purposes of this act, to grant a part or parts of such waste or common lands in perpetuity for the several purposes of this act, leaving sufficient common for the several persons having right of common upon such wastes or commons, and obtaining the consent of the lessee of such lands, if the same shall be in lease." Lords of Manors, which contain any waste Lands convenient for the Purposes of this Act, may grant a Part thereof in Perpetuity, &c.

[The 43 Geo. 3, c. 108, enacts—

43 Geo. 3,
c. 108.

["Whereas a sufficient number of churches and chapels for the celebration of divine service, according to the rites and ceremonies of the united church of England and Ireland, and of mansion houses with competent glebes for the residence of ministers officiating in such churches and chapels, is necessary towards the promotion of religion and morality: And whereas the same are either wholly wanting or materially deficient in many parts of England and Ireland: And whereas many well disposed persons would be desirous of contributing towards the supply of such defects, if they were enabled so to do in the manner hereinafter directed:'] be it enacted, That all and every person and persons having in his or their own right any estate or interest in possession, reversion, or contingency, of or in any lands or tenements, or of any property of or in any goods or chattels, shall have full power, licence, and authority, at his and their will and pleasure, by deed inrolled in such manner, and within such time, as is directed in England by the statute made in the twenty-seventh year of the reign of King Henry the Eighth, and in Ireland by the statute made in the tenth year of the reign of King Charles the First, for inrolment of bargains and sales, or by his, her, or their last will or testament in writing duly executed according to law, such deed, or such will or testament, being duly executed three calendar months at least before the death of such grantor or testator, including the days of the execution and death, to give and grant to and vest in any person or persons, or body politic or corporate, and their heirs and successors respectively, all such his, her, or their estate, interest, or property in such lands or tenements, not exceeding five acres, or goods and chattels, or any part or parts thereof, not exceeding in value five hundred pounds, for or towards the erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the liturgy and rites of the said united church are or shall be used or observed, or any mansion Persons possessed in their own Right may, by Deed enrolled (in England under Stat. 27 H. 8, c. 16, and in Ireland under Stat. 10 C. st. 2, c. 1, s. 17), or by Will executed 3 Months before their Decease, give Lands not exceeding five Acres, or Goods and Chattels not exceeding 500*l.*, for the Purposes of this Act.

43 Geo. 3,
c. 108.

Not to extend
to Infants,
Femes Co-
vert, &c.

Only one such
Gift shall be
made by one
Person, and
where it ex-
ceeds Amount
the Chan-
cellor may re-
duce it.

Plots of Land
not exceeding
one Acre,
held in Mort-
main, may
be granted
either by Ex-
change or
Benefaction
for being
annexed to a
Church, &c.

house for the residence of any minister of the said united church, officiating or to officiate in any such church or chapel, or of any out-buildings, offices, church-yard, or glebe for the same respectively, and to be for those purposes applied, according to the will of the said benefactor in and by such deed enrolled, or by such will or testament executed as aforesaid expressed, the consent and approbation of the ordinary being first obtained, and in default of such direction, limitation, or appointment, in such manner as shall be directed and appointed by the patron and ordinary, with the consent and approbation of the parson, vicar, or other incumbent; and such person and persons, bodies politic and corporate, and their heirs and successors respectively, shall have full capacity and ability to purchase, receive, take, hold, and enjoy, for the purposes aforesaid, as well from such persons as shall be so charitably disposed to give the same, as from all other persons as shall be willing to sell or aliene to such person or persons, bodies politic or corporate, any lands or tenements, goods, or chattels, without any licence or writ of *ad quod damnum*, the statute of mortmain, or any other statute or law to the contrary notwithstanding: Provided always, that this act or any thing therein contained, shall not extend to enable any person or persons being within age, or of non-sane memory, nor women covert without their husbands, to make any such gift, grant, or alienation; any thing in this act contained to the contrary in any-wise notwithstanding.

[Sect. 2. "Provided also, that no more than one such gift or devise shall be made by any one person, and that if any such gift or devise as aforesaid shall happen to exceed five acres in lands or tenements, or the value of five hundred pounds in goods and chattels, every such gift or devise shall be good and valid to the extent aforesaid; and it shall be lawful for the lord chancellor for the time being, on petition, to make order for reducing every such gift or devise to and within the said limits, and for allotting such specific five acres, and if occasion should require, such specific goods and chattels as in his judgment shall be most convenient, and to make such further order touching the premises as to him shall appear just and reasonable.

[Sect. 4. "And whereas it often happens that small plots of land held in mortmain lie convenient to be annexed to some such church or chapel, or house of residence, as aforesaid, or to some church-yard, or curtilage thereto belonging, or convenient to be employed as the scite of some such church or chapel, or house to be hereafter erected, and for the necessary and commodious use and enjoyment thereof, and that they might be so employed to the advantage of the public, and without detriment to the proprietors thereof, if they were enabled to give and grant the same for the purposes aforesaid: be it therefore further enacted, that it shall be lawful for every body politic or corporate, sole or aggregate, by deed inrolled as aforesaid, with or without confirmation, as the law may require, to give and grant, either by way of exchange or benefaction, any such small plot of land not exceeding one acre, to any person or persons, body politic or corporate, his and their heirs and successors respectively, to be held, used, and applied for the purposes aforesaid; and such last-mentioned person and persons, bodies politic and corporate, and

their heirs and successors respectively, shall have full capacity and ability, with consent of the incumbent, patron, and ordinary, to take, hold, and enjoy such small plot of land for the purposes aforesaid, without any licence or writ of *ad quod damnum*, the statute of mortmain, or any other act or law to the contrary notwithstanding."

43 Geo. 3,
c. 108.

[And the 51 Geo. 3, c. 115, to remove all doubts as to the power of the crown to make such grants, enacted—

[" 'Whereas by an act passed in the forty-third year of his present majesty's reign, intituled, 'An Act to promote the building, repairing, or otherwise providing of Churches and Chapels, and of Houses for the Residence of Ministers, and the providing of Church-Yards and Glebes;' it was enacted, that every person and persons having in his or their own right any estate or interest in possession, reversion or contingency of or in any lands or tenements, or of any property of or in any goods or chattels, should have full power, licence and authority, by deed inrolled, in such manner, and within such time as is directed in England by the statute made in the twenty-seventh year of the reign of King Henry the Eighth, and in Ireland by the statute made in the tenth year of the reign of King Charles the First, for inrolment of bargains and sales; or by his, her, or their last will or testament in writing, duly executed according to law, such deed or such will or testament being duly executed three calendar months at least before the death of such grantor or testator, including the days of the execution and death, to give and grant to and vest in any person or persons, or body politic or corporate, and their heirs and successors respectively, all such his, her or their estate, interest or property in such lands or tenements not exceeding five acres, or goods and chattels, or any part or parts thereof, not exceeding in value five hundred pounds, for or towards the erecting, rebuilding, repairing, purchasing or providing any church or chapel where the liturgy and rights of the said united church are or shall be used or observed, or any mansion house for the residence of any minister of the said united church, officiating or to officiate in any such church or chapel, or of any out-buildings, offices, church-yard or glebe for the same respectively, and to be for those purposes applied according to the will of the said benefactor in and by such deed enrolled, or by such will or testament executed as aforesaid expressed (the consent and approbation of the ordinary being first obtained), and in default of such direction, limitation or appointment, in such manner as shall be directed and appointed by the patron and ordinary, with the consent and approbation of the parson, vicar or other incumbent; and such person and persons, bodies politic and corporate, and their heirs and successors respectively, should have full capacity and ability to purchase, receive, take, hold and enjoy for the purposes aforesaid, as well from such persons as shall be so charitably disposed to give the same, as from all other persons as shall be willing to sell or alien to such person or persons, bodies politic or corporate, any lands or tenements, goods or chattels, without any licence or writ of *Ad quod damnum*: and whereas doubts have arisen whether the powers and provisions of the said act will enable his majesty to make any such grant for the purposes before mentioned: and

51 Geo. 3,
c. 115.

51 G. 3, c. 115.

His majesty
may vest
Lands in any
Person for
building or
repairing
Church or
Chapel, or
House for Re-
sidence of
Minister.

9 H. 3, c. 36.

1 Anne, st. 1.

c. 7.

No grant to
exceed five
acres.

whereas it is expedient that the powers of the said act should be extended for that purpose ;' be it therefore enacted, that the king's most excellent majesty, his heirs and successors, shall have full power, licence and authority, by deed or writing under the great seal, or under the seal of his duchy and county palatine of Lancaster, to give and grant and vest in any person or persons, bodies politic or corporate, and their heirs and successors respectively, all such his, her, or their estate, interest or property in any lands or tenements within the survey of the Court of Exchequer, or of the duchy of Lancaster, for or towards the erecting, rebuilding, repairing, purchasing or providing any church or chapel where the liturgy and rites of the said united church are or shall be used or observed, or any mansion house for the residence of any minister of the said united church officiating or to officiate in any such church or chapel, or of any out-buildings, offices, church-yard or glebe for the same respectively, and to be for those purposes applied in and by such deed as aforesaid expressed, the consent and approbation of the ordinary being first obtained, and such person and persons, bodies politic and corporate, and their heirs and successors respectively, shall have full capacity and ability to receive, take, hold and enjoy for the purposes aforesaid, any lands or tenements notwithstanding the statute of mortmain, or the act of the first year of her late majesty Queen Anne, intituled, 'An Act for the better Support of her Majesty's Household, and the Honour and Dignity of the Crown,' or any other act or acts, or other impediment or disability whatsoever : provided always, that nothing in this act contained shall extend or be construed to extend to enable his majesty, his heirs and successors, to grant more than five acres in any one grant for any of the purposes aforesaid, or to alter or amend any of the provisions of the said act of the forty-third year of his present majesty, which are not hereinbefore specially named and mentioned."

[And by sect. 2 it is provided—

Any Person
having Fee
Simple of
Manor may
grant five
Acres of
Waste for Ec-
clesiastical
purposes.

["That it shall be lawful for any person or persons, bodies politic or corporate, seized of or entitled to the entire and absolute fee simple of any manor, by deed under the hand and seal or hands and seals of any such person or persons, and under the seal or seals of any such body or bodies politic or corporate, and inrolled in the Court of Chancery, to grant to the rector, vicar, or other minister of any parish church and his successors, or to the curate or minister of any chapel and his successors, any parcel or parcels of land not exceeding in the whole the quantity of five statute acres, parcel of the waste of such manor, and lying within the parish where such church or chapel shall be or shall be intended to be erected, or within any extra-parochial district wherein any such chapel shall be or shall be intended to be erected, for the purpose of erecting thereon or enlarging any such church or chapel, or for a church-yard or burying ground, or enlarging a church-yard or burying ground for such parish or extra-parochial place, or for a glebe for the rector, vicar, curate or other minister of any such church or chapel, to erect a mansion house or other buildings thereon, or make other conveniences for the residence of such rector, vicar, curate or other minister, freed and absolutely discharged of and

from all rights of common thereon, and any statute prohibiting any alienation in mortmain, or other statute, law or custom to the contrary notwithstanding: provided always, that no grant whatsoever shall be made of any land whatsoever, for any of the purposes authorized by this act, unless the church or chapel for the benefit whereof or of the minister whereof such grant shall be made shall be a parochial church or chapel for the service of the united church of England and Ireland, duly authorized by law, or a church or chapel duly consecrated for the service of such church, or erected, or to be erected for such purpose by and with the licence and consent of the ordinary of the diocese wherein the same shall be."

51 G. 3, c. 115.

Grants restricted to parochial Churches or Chapels.

[See also sect. 55 Geo. 3, c. 147, under the titles *Glebe Lands* and *Mortmain*, in the second volume of this work.

[II. *Residence-House of Deans and Canons.*

[The 18th section of 4 & 5 Vict. 39, which repeals a former provision of sect. 58 of 3 & 4 Vict. c. 113, on the same subject, and also a clause of 2 & 3 Will. 4, c. 10, relating to the annexation of a house of residence to the archdeaconry of Durham, enacts,

4 & 5 Vict.

c. 39, s. 18.

Disposal of Residence Houses.

["That the dean and chapter of any cathedral or collegiate church, with the consent of their visitor, may from time to time sanction and confirm the exchange of houses of residence, or of houses attached to any dignities, offices, or prebends in the precincts of such church, among the canons of such church, or may make any such arrangement to take effect at any future time, or may assign any one of such houses being vacant to any canon willing to accept the same in lieu of the house theretofore occupied by him, and thereupon any house no longer required by any canon may by the said dean and chapter be disposed of, in such way as they shall deem fit, with the consent of their visitor, and of the ecclesiastical commissioners for England, signified under their common seal; provided that all acts, matters and things relating to any such house already done under the last-mentioned provisions of the said secondly recited act shall be valid and effectual to all intents and purposes."

[The 3 & 4 Vict. c. 113, enacts by

3 & 4 Vict.

c. 113.

1 & 2 Vict.

c. 23, relating to Residence-Houses, to apply to Deans and Canons.

[Sect. 59. "That it shall be lawful for the ecclesiastical commissioners to authorize any dean or canon of any cathedral church to raise monies on his deanery or canonry, for the purpose of building, enlarging, or otherwise improving the residence-house thereof, on such terms and conditions as the said commissioners, with the concurrence of the bishop and the chapter, shall approve; and all the provisions of an act passed in the first year of the reign of her present Majesty, intituled, 'An Act to amend the Law for providing fit Houses for the Beneficed Clergy,' shall be applied, *mutatis mutandis*, to all such cases in which any dean or canon shall be authorized as aforesaid to raise monies on his deanery or canonry for the purpose aforesaid."

(y) [See title *Deans and Chapters*, vol. ii. for this statute.]

[III. *Residence-Houses of Bishops.*

[The 6 & 7 Will. 4, c. 77, recommended “That fit residences be provided for the Bishops of Lincoln, Llandaff, Rochester, Manchester, and Ripon; and that, for the purpose of providing the bishop of any diocese with a more suitable and convenient residence than that which now belongs to his see, sanction be given for purchases or exchanges of houses or lands, or for the sale of lands belonging to the respective sees, and also, where it may be necessary, for the borrowing by any bishop of a sum not exceeding two years’ income of his see, upon such terms as shall appear to be fit and proper; and that the governors of the bounty of Queen Anne be empowered to lend money upon mortgage.” On the 1st of July, 1839, the 2 & 3 Vict. c. 18, was passed, “to enable Archbishops and Bishops to raise money on Mortgage of their Sees, for the purpose of building Houses of Residence;” its enactments may be arranged under the following heads (z):—

1. Power to mortgage for building or repairing palace (ss. 1, 2).
2. Necessary preliminaries to such mortgage (s. 3).
3. Necessary covenant in such mortgage (s. 4).
4. Payment of principal and interest (part of s. 9).
5. Power of distress for arrears of payment (ss. 5, 6).
6. Mortgagor’s power to grant leases (s. 8).
7. Nominees to receive money—their appointment and duties (ss. 7, 15).
8. Depository of nominees’ accounts (s. 7).
9. Insurance from fire and penalty for neglect (ss. 9, 10).
10. Provisions for vacancy of see (s. 11).
11. Power to apply building materials for purpose of this act (s. 12).
12. Power to apply dilapidation monies (s. 13).
13. Power of persons to advance money, and to sell for purposes of this act (ss. 14, 17).
14. Power to purchase houses or lands for residence (ss. 16, 18, 19, 20, 21).—Ed.]

Resignation (a).

FOR general bonds of resignation, see the title **Simony**.

Resignation,
what.

A resignation is, where a parson, vicar, or other beneficed clergyman, voluntarily gives up and surrenders his charge and preferment to those from whom he received the same (b).

To whom to
be made.

That ordinary who hath the power of institution, hath power also to accept of a resignation made of the same church to

(z) [The act, which relates solely to Bishops’ houses, seemed too long for insertion in this place, but will be found in the Appendix.—Ed.]

good; Wats. c. 4; *Fairchild v. Gair*, Dyer’s Rep. 294 (a), n. 6. But there is a note there that the judges held the contrary.

(a) The word *resignation* is not

(b) Deg. p. 1, c. 14.

which he may institute; and therefore the respective bishop, or other person, who, either by patent under him, or by privilege or prescription, hath the power of institution, are the proper persons to whom a resignation ought to be made (c). And yet a resignation of a deanery in the king's gift may be made to the king, as of the deanery of Wells; and some hold, that the resignation may well be made to the king of a prebend that has no donative; but others, on the contrary, have held, that a resignation of a prebend ought to be made only to the ordinary of the diocese, and not to the king, as supreme ordinary, because the king is not bound to give notice to the patron (as the ordinary is) of the resignation; nor can the king make a collation by himself without presenting to the bishop, notwithstanding his supremacy (d).

And resignation can only be made to a superior: this is a maxim in the temporal law, and is applied by Lord Coke to the ecclesiastical law, when he says, that therefore a bishop cannot resign to the dean and chapter (e), but it must be to the metropolitan, from whom he received confirmation and consecration (f).

And it must be made to the next immediate superior, and not to the mediate; as of a church presentative to the bishop and not to the metropolitan (g).

But donatives are not resignable to the ordinary, but to the patron who hath power to admit (h).

And if there be two patrons of a donative, and the incumbent resign to one of them, it is good for the whole (i).

Regularly, resignation must be made in person, and not by proxy. There is indeed, a writ in the register, entitled, *Litera procuratoria ad resignandum*, by which the person constituted proctor was enabled to do all things necessary to be done in order to an exchange; and of these things, resignation was one. And Lindwood supposeth that any resignation may be made by proctor, and herewith the canon law agrees (k). But in practice, there is no way (as it seemeth) of resigning, but either to do it by personal appearance before the ordinary, or at least to do it elsewhere before a public notary, by an instrument directed immediately to the ordinary, and attested by the said notary, in order to be presented to the ordinary by such proper hand as may pray his acceptance. In which case the person presenting the instrument to the ordinary doth not resign *nomine procuratorio*, as proctors do, but only presents the resignation of the person already made (l).

Whether it
must be made
in Person.

(c) "Ad eum fieri debet renunciatio ad quem spectat confirmatio." Inst. J. C. i. 19.

(d) 2 Roll. Abr. 358; Wats. c. 4.

(e) 1 Roll. Rep. 137.

(f) Gibs. 822.

(g) 2 Roll. Abr. 358.

(h) Gibs. 822.

(i) Deg. p. 1, c. 14.

(k) Inst. J. C. i. 9.

(l) Gibs. 822; Deg. p. 1, c. 14; Wats. c. 4.

Heyes v. Exeter College, Oxford (l). In this case the defendant Vye, by an instrument in the usual form, attested by a notary public, and directed to the Bishop of Exeter, expressed his resignation of the vicarage of Merthoe, in the county of Devon, and two other notaries public were constituted by him as his proctors to exhibit the same to the bishop. The instrument was sent by the post to the bishop, who merely indorsed it, and signed a memorandum of his acceptance of the resignation, which was held to be sufficient, though no public act.

Must be absolute and not conditional.

A collateral condition may not be annexed to the resignation, no more than an ordinary may admit upon condition, or a judgment be confessed upon condition, which are judicial acts (m).

For the words of resignation have always been *purè, spontè, absolutè et simpliciter*, to exclude all indirect bargains, not only for money, but for other considerations. And therefore in *Gayton's case*, E., 24 Eliz., where the resignation was to the use of two persons therein named, and further limited with this condition, that if one of the two was not admitted to the benefice resigned, within six months, the resignation should be void and of none effect; such resignation, by reason of the condition, was declared to be absolutely void (n).

But where the resignation is made for the sake of exchange only, there it admits of this condition, viz. if the exchange shall take full effect, and not otherwise, as appears by the form of resignation which is in the register (o).

If two parsons obtain licence from the ordinary to exchange their benefices, the exchange must be fully executed by both parties during their lives, otherwise all proceedings are void (p).

By a constitution of Othobon, "Whereas sometimes a man resigneth his benefice that he may obtain a vacant see, and bargaineth with the collator, that if he be not elected to the bishopric, he shall have his benefices again, we do decree, that they shall not be restored to him, but shall be conferred upon others, as lawfully void; and if they be restored to him, the same shall be of no effect; and he who shall so restore him, after they have been resigned into his hands, or shall institute the resigner into them again, if he is a bishop he shall be suspended from the use of his dalmatic and pontificals, and if he is an inferior prelate he shall be suspended from his office, until he shall think fit to revoke the same (q)."

Must be accepted by the proper Ordinary.

No resignation can be valid, till accepted by the proper ordinary; that is, no person appointed to a cure of souls can quit that cure, or discharge himself of it, but upon good motives, to be approved by the superior who committed it to him, for it may be he would quit it for money, or to live idly, or the

(l) 12 Ves. 336.

(m) Wats. c. 4.

(n) God. 277; Gibs. 821; 1 Still. 334.

(o) Gibs. 821.

(p) See Reg. f. 306 B; 2 Rep. 74

B; Hob. 152; 3 Wils. 495.

(q) Athon, 134.

like. And this is the law temporal as well as spiritual, as appears by that plain resolution which hath been given, that all presentations made to benefices resigned before such acceptance are void. And there is no pretence to say, that the ordinary is obliged to accept, since the law hath appointed no known remedy, if he will not accept any more than he will not ordain (*r*).

Lindwood makes a distinction in this case, between a cure of souls and a sinecure. The resignation of a sinecure, he thinks, is good immediately, without the superior's consent, because none but he that resigneth hath interest in that case, but where there is a cure of souls it is otherwise, because not he only hath interest, but others also unto whom he is bound to preach the word of God; wherefore in this case it is necessary that there be the ratification of the bishop, or of such other person as hath power by right or custom to admit such resignation (*s*).

Thus, in the case of *The Marchioness of Rockingham v. Griffith*, Mar. 22, 1755 (*t*), Dr. Griffith being possessed of the two rectories of Leythley and Thurnsco, in order that he might be capacitated to accept another living which became vacant, to wit, the rectory of Handsworth, executed an instrument of resignation of the rectory of Leythley aforesaid, before a notary public, which was tendered to and left with the archbishop of York, the ordinary of the place within which Leythley is situate. It was objected, that here doth not appear to have been any acceptance of the resignation by the archbishop, and that without his acceptance the said rectory of Leythley could not become void. And it was held by the lord chancellor clearly that the ordinary's acceptance of the resignation is absolutely necessary to make an avoidance; but whether in this case there was a proper resignation and acceptance thereof, he reserved for further consideration; and in the mean time recommended it to the archbishop to produce resignation in court. Afterwards, on the 17th of April, 1755, the cause came on again to be heard, and the resignation was then produced, but the counsel for the executors of the late marquis declaring that they did not intend to make any further opposition, the lord chancellor gave no opinion upon the resignation, or the effect of it; but in the course of the former argument, he held, that the acceptance of a resignation by the ordinary is necessary to make it effectual, and that it is in the power of the ordinary to accept or refuse a resignation.

Ordinary
may accept
or refuse a
Resignation.

And in the case of *Hesket v. Grey*, H., 28 Geo. 2, where a general bond of resignation was put in suit; and the defendant pleaded that he offered to resign, but the ordinary would not accept the resignation, the Court of King's Bench were unani-

(*r*) Gibs. 822; 1 Still. 334.

(*t*) S. C. 4 Bac. Abr. 472.

(*s*) Gibs. 823.

mously of opinion, that the ordinary is a judicial officer, and is intrusted with a judicial power to accept or refuse a resignation as he thinks proper: and judgment was given for the plaintiff^(u).

Whether the ordinary may refuse to accept a resignation without assigning any cause, or whether in such case he may be compelled to assign a sufficient cause, is undecided^(x).

From what
time Lapse
after Re-
signation
shall incur.

After acceptance of the resignation, lapse shall not run but from the time of notice given; it is true, the church is void immediately upon acceptance, and the patron may present if he please; but as to lapse, the general rule that is here laid down is the unanimous doctrine of all the books. Insomuch that if the bishop who accepted the resignation, dies before notice given, the six months shall not commence till notice is given by the guardian of the spiritualties, or by the succeeding bishop, with whom the act of resignation is presumed to remain^(y).

Corrupt
Resignation.

By the 31 Eliz. c. 6, s. 8, "If any incumbent of any benefice with cure of souls shall corruptly resign the same; or corruptly take for or in respect of the resigning the same, directly or indirectly, any pension, sum of money, or other benefit whatsoever: as well the giver, as the taker, of any such pension, sum of money, or other benefit corruptly, shall lose double the value of the sum so given, taken or had; half to the queen, and half to him that shall sue for the same in any of her majesty's courts of record."

Any Pension.—Before this statute, the bishop, in cases of resignation, might, and did frequently, assign a pension during life, out of the benefice resigned, to the person resigning^(z).

And by the statute of the 26 Hen. 8, c. 3, intituled, "An Act for the Payment of First Fruits and Tenths," it was enacted, that incumbents charged with pensions payable to their predecessors during their lives, should deduct the tenth part thereof out of such payment, inasmuch as they were charged by the said act to pay the tenths of their whole living unto the king.

And by the same act it was provided, that no pension thereafter should be assigned by the ordinary, or by any other manner of agreement by collateral security or otherwise, upon any resignation of any dignity, benefice or promotion spiritual, above the value of the third part of the dignity, benefice or promotion spiritually resigned.

But now, by the aforesaid act of 31 Eliz., no pensions whatsoever can be reserved.

[For simoniacal resignation, see *Simony*.]

(u) See title *Simony*.

(x) See the note to the case of *The Bishop of London v. Fychte*, under title *Simony*; and Mr. Christian's

note to 1 Bl. Com. 393.

(y) *Gibs.* 823.

(z) *Gibs.* 822.

Respond.

RESPOND, was a short anthem sung, after reading three or four verses of a chapter; after which the chapter did proceed (*a*).

Restoration of King Charles the Second—See **Holidays**.

Review, Commission of—See **Appeal**.

Rochet.

ROCHET (a part of the episcopal habit), is a linen garment gathered at the wrists; and differeth from a surplice in that a surplice had open sleeves hanging down, but a rochet hath close sleeves (*b*).

It was also one of the sacerdotal vestments; and in that respect differed from a surplice in that it had *no* sleeves (*c*).

Rogation Days—See **Holidays**.

Right of Patronage—See **Advowson**.

Rural Dean—See **Deans**.

[**Rubric**—See **Holidays, Lord's Day, Public Worship**.]

Sabbath—See **Lord's Day**.

Sacraments.

ARTICLE 35.—"There are two sacraments ordained of Christ our Lord in the Gospel, that is to say, baptism and the supper of the Lord."

Those five commonly called sacraments, that is to say, confirmation, penance, orders, matrimony and extreme unction, are not to be counted for sacraments of the Gospel: being such

(*a*) Gibs. 263.

(*b*) Lindw. 251.

(*c*) Lindw. 252.

as have grown partly of the corrupt following of the apostles, partly are states of life allowed by the Scriptures; but yet have not like nature of sacraments with baptism and the Lord's supper, for that they have not any visible sign or ceremony ordained of God.

For the sacrament of baptism, see the title **Baptism**.

For the sacrament of the Lord's supper, see the title **Lord's Supper**.

Sacrilege—See **Church**.

Sanctuary—See **Church**.

Schools (a).

1. <i>Origin of, and Kinds of</i> . . . 546	6. <i>Grammar Schools — Discipline of, before 3 & 4 Vict.</i>
2. <i>Power of Foundation and application of Funds before 3 & 4 Vict. c. 77.</i> . . . 550	c. 77. 577
3. <i>Since that Statute</i> . . . 551	7. <i>Discipline of Grammar Schools since 3 & 4 Vict.</i>
4. <i>Ecclesiastical Jurisdictions over Grammar Schools.</i> . . 555	c. 77. 583
5. <i>Sites for Schools</i> . . . 565	8. <i>Taxes.</i> 586

I. *Origin and Kinds of.*

Origin of
Schools.

[IT has been observed under the title **College**, that the earliest origin of universities is to be traced to the schools which grew up under the shelter of the church. The general establishment of universities throughout Europe overshadowed these humbler seminaries of religious and useful learning, and were occasionally designated by their name. We find after the tenth century the appellations of "schola" and "studium generale" applied by contemporary writers to the universities which were yet in their infancy. But during the earlier centuries of the Christian era, the schools of the church were, in this country particularly, but indeed in all, with very few and special exceptions, the sole source of education. The school which obtained the earliest celebrity was that of Alexandria, which numbered among its disciples St. Athanasius, and among its preceptors Origen. Thomassin says, that in this school "literæ humaniores" were taught, as well as the Scriptures. Theodoret bestows great praise on a similar institution at Edessa. During the sixth, seventh and eighth centuries, from the time of Clovis to Charlemagne, there appear to have been

(a) [Thomassini *Vetus et Nova Ecclesiæ Disciplina*, vol. i. pt. ii. c. 90 to 100.]

four distinct kinds of schools more or less prevalent, not in Europe, but in such part of Asia and Africa as had witnessed the establishment of the church. 1. Schools in the parochial districts. 2. Schools in bishops' houses. 3. Schools in monasteries. 4. The school of the archdeacon, which seems to have been peculiar to Africa. In these schools were educated not merely those who were destined to discharge clerical functions, but all those who were to be employed in any civil offices of the state (*b*). Charlemagne (*c*), whose palace (*d*) was a seminary of all the learning which the age afforded, sent a circular letter to his bishops ordaining the general institution of schools throughout their dioceses, in order that the clergy being imbued (*e*) with the language of classical literature might the better be able to study the Holy Scriptures.

[The capitularies of Louis the Debonnaire (823) contain directions that what were subsequently called the four faculties—namely, Theology, Law, Medicine, and the Arts—should be taught in these schools, and about this time the Decretals of Gratian began to form a regular branch of study in the schools of monasteries and cathedrals. During the sixth, seventh and eighth centuries, the schools of Rome appear (*f*) to have served as a model for the rest of Europe, and especially for these islands. Thomassin cites with approbation the remark of Bede, that the discipline and studies of our schools were borrowed immediately from those of Ireland or France (*g*), of which the Roman school was the acknowledged archetype. The most flourishing epoch of the Anglican schools was, according to Bede, during the seventh century, while under the superintendence of Theodorus, Archbishop of Canterbury (*h*),

Different kinds of Schools.

Anglican Schools.

(*b*) [There is a remarkable passage in a letter of Gregory of Tours, who writing about the studies pursued by the son of a senator, and a slave who was his schoolfellow, observes, "nam de operibus Virgilii, Legis Theodosianæ libris, arteque calculi apprime eruditus est."—ED.]

(*c*) [See also the canon on this subject by Eugenius the Second, soon after the time of Charlemagne. Dist. 37, c. 12; and another ancient canon, Extra. l. 3, t. 1, c. 2.—ED.]

(*d*) [Erat ipsius Caroli palatium schola longè splendidissima sedes potissima in quâ humanæ omnes divinæque literæ efflorescerent.]

(*e*) ["Quarum subsidio freti" is the expression cited by Thomassin, c. 96, s. 8, c. 2.—ED.]

(*f*) [Thomassin, citing Joannes Diaconus, the biographer of Gregory the Great, says, "Tunc, rerum sa-

piencia Romæ sibi templum visibiliter quodammodo fabricarat, &c. &c., re-floruerant ibi diversarum artium studia, &c." Vol. iii. l. i. c. 95, s. 3.—ED.]

(*g*) ["Conveniebat olim mirum in modum Angliæ Ecclesia cum Romanâ Oswaldus Rex ex Hibernia arcessivit in Angliam sanctissimum episcopum," whom he placed at Lindisfarn. "Ex hac scilicet scholâ Hiberni monachi ecclesiasticæ sapientiæ et disciplinæ fontes in omnem Angliam derivârunt, &c. ita episcopales et monasticæ scholæ cœperunt nec injucundè nec infructuosè immisceri;" and again Sigebert, king of East Anglia, "ea quæ in Gallos bene disposita vidit imitari cupiens, instituit scholam in quâ pueri litteris erudirentur, juvante se episcopo." See Thomassin, ut sup.; and Bede, lib. iii. s. 2, c. 27.—ED.]

(*h*) [Thom. vol. ii. l. i. c. 95, s. 12.]

whom Pope Agatho, writing to the sixth General Council, entitles; “Τῆς μεγάλης νηστὸς Βρεταννίας Ἀρχιεπισκοπὸν καὶ φιλοσοφόν.” Bede enumerates Astronomy, Poetry and Arithmetic, among the elements of ecclesiastical instruction as administered in the age in which he lived, and of whose good effects he himself was the most remarkable example (*i*).

Schools
after the
12th Century.

Of Eccle-
siastical Cog-
nizance in
England.

[The history of schools from the close of the eighth to that of the twelfth century is involved in considerable obscurity, but it would appear from the language of the Lateran Councils, enjoining the appointment of schoolmasters to be licensed by the bishop, in all monasteries and cathedrals, that they had fallen into considerable neglect. From the close of the twelfth century the universities became a sort of higher school for those who had derived the rudiments of instruction from the cloister (*k*). The chief provisions of the Councils of Lateran (*l*), (see title **Councils**), have been incorporated in the ecclesiastical law of England, and any body consulting the Concilia of Spelman (*m*) will see that the practice of the church in this country was always in accordance with the spirit of the orders respecting schools contained in these Councils. The injunctions issued by Queen Elizabeth at the beginning of her reign, and the canons of 1571 and 1603, as will be seen in the course of this chapter, were to the same effect. It was doubtless with reference to these considerations, that Lord Keeper Wright said, “I always was and still am of opinion that keeping of schools is by the old law of England of ecclesiastical cognizance (*n*).” So Bishop Gibson observes, “the truth is, in our records before the Reformation schools are often spoken of as *ecclesiastical* places, and the possession of them in *ecclesiastical*

(*i*) [“Hæc omnia approbabit Beda exemplis meliusculè suis quam verbis. Æterna enim omnium harum disciplinarum monumenta ille ad nos transmisit, etsi jam inde a puero in monasteriis enutritus fuerit.” Thom. ubi supra, s. 12.—ED.]

(*k*) [The language of Thomassin on this subject is very remarkable: “His accessère concilia Lateranensia III. IV. ubi instituti grammaticæ et theologiæ lectores in omnibus ecclesiis metropolitanis et cathedralibus. *Capere etiam increbescere universitates veluti cleri luculenta seminaria.* Quia et beneficiorum pars non mediocris gradibus universitatum dedicata fuit, et his quidam machinis expugnata est ignorantia.” Thom. pt. ii, l. i. c. 91, s. 7.—ED.]

(*l*) [In the third Council of Lateran (1139), held under Alexander the Third, the following Constitution was made and afterwards inserted in the body of the canon law. (Extra. l. v. t. 3, c. 1.) “Quoniam ecclesia Dei sicut pia mater providere tenetur ne pauperibus, qui parentum opibus juvari non possunt, legendi et proficiendi opportunitas per unamquamque cathedralem ecclesiam *magistro* qui clericos ejusdem et *scholares pauperes gratis* doceat competens aliquod beneficium prebeatur.” This constitution was enlarged and confirmed by the fourth Lateran Council under Innocent the Third (1215).—ED.]

(*m*) [Spelman, vol. i. p. 595; vol. ii. p. 42, 126.]

(*n*) [*Vide post.*]

terms. So, where archbishops or bishops were patrons, the grant of them is styled *collation* (*o*)."

[In England, the names free school, endowed school and grammar school, are often used without discrimination. But they have distinct significations. A free school, to speak strictly, is any school in which elementary instruction is gratuitously afforded, or very nearly so, to the children of a particular locality, whether the funds be supplied by private subscriptions, as in many of our parochial schools, or, as in some corporate towns, from the property of the corporation.

Different
kinds of
Schools in
England.
Free Schools.

[Endowed schools are those of which the whole or principal expenses are defrayed out of endowments bequeathed by the munificence of their founder. Grammar schools are also endowed schools, but to which the constitution of their founder has annexed the condition that classical instruction shall form either the whole or a large portion of the education which they impart. These schools are no insignificant characteristic of the genius of this country. It is said that Spain is the only other kingdom in Europe which affords any similar instance of the existence of a large and wealthy class of national institutions, governed entirely by the original laws of their respective founders, with the exception of a few cases in which they have been modified by the tribunals of parliament or of courts of justice (*p*). After the Reformation the fortunes of the endowed grammar schools underwent considerable vicissitudes, for this event abolishing the use of Latin in the services of the church, rendered the knowledge of that language an attainment of less necessity and an object of less desire than it had hitherto been. The grammar schools situated in populous and wealthy towns, or those which afterwards became so, retained their importance; and many also were preserved by their connection with the universities, and the great advantages which they offered (*q*) in the shape of fellowships, scholarships and exhibitions to those whom they educated. Those schools to which their founders had not annexed the condition of instruction in the dead languages, have remained for the most part as charity or gratuitous schools of elementary education. The greater part of the schools now existing in this country have indeed been founded during the sixteenth and seventeenth centuries, when the liberal charity of individuals in some measure supplied the grievous deficiency of education occasioned by the spoliation of cathedrals and monasteries, and

Endowed
Schools.

Grammar
Schools.

Foundation of
Grammar
Schools in
England.

(*o*) [Gibs. Cod. vol. ii. p. 1100, note.]

Chancellor with large powers over their revenues.—ED.]

(*p*) [It will be seen, *post*, that the 3 & 4 Vict. c. 77, professes as its object "the substantial fulfilment of the intentions of the founders," and with this view has invested the Lord

(*q*) [It is said by Mr. Carlisle, in his work on this subject, that out of 500 free and endowed, about 150 have these advantages.—ED.]

the infamous confiscation of ecclesiastical property ; a crime of no ordinary magnitude, for its evil consequences are even at this day severely felt. by the country in which it was perpetrated. Some, however, of the schools which most flourished in England, and have obtained the general appellation of public schools, are of considerable antiquity ; some, like Eton and Westminster, being the fruit of royal, and some, like Winchester and the Charter House, of private munificence. The most considerable of these are enumerated in the 24th section of 3 & 4 Vict. c. 77, as exempted from the operation of that act (n).—ED.]

—◆—

[II. *Power of Foundation and Application of Funds before 3 & 4 Vict. c. 77.*

The determinations in the courts of law relative to this title, do not seem to be delivered with that precision which is usual in other cases. And indeed, excepting in an instance or two in the Court of Chancery (as will appear), the general law concerning schools doth not seem to have been considered as yet upon full and solemn argument. And, therefore, liberty of animadversion is taken in some of the following particulars, which would not be allowable in matters finally adjudged and settled.

By the 7 & 8 Will. 3, c. 77, whereas it would be a great hindrance to learning and other good and charitable works, if persons well inclined may not be permitted to found schools for the encouragement of learning, or to augment the revenues of schools already founded ; it shall be lawful for the king to grant licences to alien, and to purchase and hold in mortmain.

But by the 9 Geo. 2, c. 36, after June 24, 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, nor any sum of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given or any ways conveyed or settled (unless it be *bonâ fide* for full and valuable consideration) to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered, in trust or for the benefit of any charitable uses whatsoever ; unless such appointment of lands, or of money or other personal estate (other than stocks in the public funds), be made by deed indented, sealed, and delivered in the presence of two witnesses, twelve months at least before the death of the donor, and be enrolled in chancery within six calendar months next after the execution thereof ; and unless such stock in the public funds be transferred in the public books

(n) [*Vide post.*]

usually kept for the transfer of stocks, six calendar months at least before the death of the donor: and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without power of revocation. And any assurance otherwise made shall be void (o).

Attorney-General v. Whiteley. (p) In this case it appeared that certain funds had been given at several times towards the foundation and support of a free grammar school at Leeds, for teaching grammatically the learned languages. Application was now made that part of the funds might be applied for the purpose of procuring masters to teach the French and German languages, and of promoting other objects with a view to commerce. It was alleged that the town of Leeds and its neighbourhood had of late years increased very much in trade and population, and therefore the learning of the French and other modern languages was become a matter of great utility to its merchants and inhabitants. The lord chancellor rejected the application, on the ground that the nature of a charity could not be changed by transferring it to objects different from those intended by the founder, merely on the notion of an advantage to the inhabitants of the place.

[It has been held that an endowment for a free grammar school without more words means a school for teaching the elements of the learned languages, but an usage to teach other branches of learning, may be taken as explanatory of the words, and to put a different construction on them (q). Where a school, upon the true construction of the instruments establishing it, ought to be a grammar school for instruction in the classics, the trustees have not been allowed to convert it into a school for merely English writing and arithmetic, though it had ceased from before the time of living memory to be a place for classical education, and though it appears from old regulations that elementary instruction in English had always been one of the objects of the institution (r). Building a school house and educating poor children has been adjudged to be within the meaning of a trust for the "relief of the poor" (s).

[III. *Power of Foundation and Application of Funds* since 3 & 4 Vict. c. 77.

[But the 3 & 4 Vict. c. 77, has brought an extensive, and, it is to be hoped, a beneficial change in the law upon this

(o) For the exposition of this act with regard to schools, see tit. *Mortmain*.

(p) 11 Ves. 241; see title *Mortmain*.

(q) [*Attorney-General v. Hartley*, 2 J. & W. 379.]

(r) [*Attorney-General v. Haberdashers' Company*, 3 Russ. 531; S. P. *Attorney-General v. Dixie*, 3 Russ. 534.]

(s) [*Wilkinson v. Malin*, 2 C. & J. 636; 2 Tyr. 544.]

subject. It was intituled "An Act for improving the Condition and extending the Benefits of Grammar Schools;" it was passed on the 7th of August, 1840; it enacts as follows by the twelve first sections.

3 & 4 Vict.
c. 77.

[Sect. 1. "Whereas there are in England and Wales many endowed schools, both of royal and private foundation, for the education of boys or youth wholly or principally in grammar; and the term 'grammar' has been construed by courts of equity as having reference only to the dead languages, that is to say, Greek and Latin: and whereas such education, at the period when such schools or the greater part were founded, was supposed not only to be sufficient to qualify boys or youth for admission to the Universities, with a view to the learned professions, but also necessary for preparing them for the superior trades and mercantile business: and whereas from the change of times and other causes such education, without instruction in other branches of literature and science, is now of less value to those who are entitled to avail themselves of such charitable foundations, whereby such schools have, in many instances, ceased to afford a substantial fulfilment of the intentions of the founders; and the system of education in such grammar schools ought therefore to be extended and rendered more generally beneficial, in order to afford such fulfilment; but the patrons, visitors, and governors thereof are generally unable of their own authority to establish any other system of education than is expressly provided for by the foundation, and her Majesty's courts of law and equity are frequently unable to give adequate relief, and in no case but at considerable expense: and whereas in consequence of changes which have taken place in the population of particular districts it is necessary, for the purpose aforesaid, that in some cases the advantages of such grammar schools should be extended to boys other than those to whom by the terms of the foundation or the existing statutes the same is now limited, and that in other cases some restriction should be imposed, either with reference to the total number to be admitted into the school, or as regards their proficiency at the time when they may demand admission; but in this respect also the said patrons, visitors, and governors, and the courts of equity, are frequently without sufficient authority to make such extension or restriction: and whereas it is expedient that in certain cases grammar schools in the same place should be united: and whereas no remedy can be applied in the premises without the aid of parliament: be it therefore declared and enacted, &c. That whenever, after the passing of this act, any question may come under consideration in any of her Majesty's courts of equity concerning the system of education thereafter to be established in any grammar school, or the right of admission into the same, whether such question be already pending, or whether the same shall arise upon any information, petition, or other proceedings which may be now or at any time hereafter filed or instituted, for whatever cause the same may have been or may be instituted, according to the ordinary course of proceedings in courts of equity, or under the provisions of this act, it shall be lawful for the court to make such decrees or orders as to the said court shall seem expedient, as well for extending the system of

Courts of Equity empowered, whenever a Question comes before them, to make Decrees or Orders extending the System of Education and the Right of Admission into any School, and to establish Schemes for

education to other useful branches of literature and science in addition to or (subject to the provisions hereinafter contained) in lieu of the Greek and Latin languages, or such other instruction as may be required by the terms of the foundation or the then existing statutes, as also for extending or restricting the freedom or the right of admission to such school, by determining the number or the qualifications of boys who may thereafter be admissible thereto, as free scholars or otherwise, and for settling the terms of admission to and continuance in the same, and to establish such schemes for the application of the revenues of any such schools as may in the opinion of the court be conducive to the rendering or maintaining such schools in the greatest degree efficient and useful, with due regard to the intentions of the respective founders and benefactors, and to declare at what period and upon what event such decrees or orders, or any directions contained therein, shall be brought into operation, and that such decrees and orders shall have force and effect notwithstanding any provisions contained in the instruments of foundation, endowment, or benefaction, or in the then existing statutes: provided always, that in case there shall be any special visitor appointed by the founder, or other competent authority, opportunity shall be given to such visitor to be heard on the matters in question, in such manner as the court shall think proper, previously to the making such decrees or orders."

3 & 4 Vict.
c. 77.

the Application of its Revenues, having due Regard to the Intentions of the Founder.

[Sect. 2. "That in making any such decree or order, the court shall consider and have regard to the intentions of the founders and benefactors of every such grammar school, the nature and extent of the foundation and endowment, the rights of parties interested therein, the statutes by which the same has been hitherto governed, the character of the instruction theretofore afforded therein, and the existing state and condition of the said school, and also the condition, rank, and number of the children entitled to and capable of enjoying the privilege of the said school, and of those who may become so capable if any extended or different system of education, or any extension of the right of admission to the said school, or any new statute shall be established."

Before making such Decrees the Courts shall consider the Intentions of the Founders, the State of School, &c.

[Sect. 3. "That unless it shall be found necessary from the insufficiency of the revenues of any grammar school, nothing in this act contained shall be construed as authorizing the court to dispense with the teaching of Latin and Greek, or either of such languages, now required to be taught, or to treat such instruction otherwise than as the principal object of the foundation; nor to dispense with any statute or provision now existing, so far as relates to the qualification of any schoolmaster or under master."

Court not to dispense with the principal Objects, or the Qualifications required, unless, &c.

[Sect. 4. "That in extending, as herein-before provided, the system of education or the right of admission into any grammar school in which the teaching of Greek or Latin shall be still retained, the court shall not allow of the admission of children of an earlier age or of less proficiency than may be required by the foundation or existing statutes, or may be necessary to show that the children are of capacity to profit by the kind of education designed by the founder."

Standard of Admission not to be lowered where Greek and Latin is retained.

[Sect. 5. "That whenever, on account of the insufficiency of the revenues of any grammar school the court shall think fit to dispense

Where the teaching of Greek and

3 & 4 Vict.
c. 77.

Latin is dispensed with, analogous Instruction to be substituted, &c.

Qualifications of new Schoolmasters and Right of Appointment regulated.

Schools to be Grammar Schools, though Greek and Latin dispensed with, and Masters subject to the Ordinary.

Extension of Right of Admission not to prejudice existing Rights.

Where several Schools are in one place, and the Revenues of any are insufficient, they may be united.

with the teaching of Greek or Latin, the court shall prescribe such a course of instruction, and shall require such qualifications in the children at the period of their admission, as will tend to maintain the character of the school as nearly as, with reference to the amount of the revenues, it may be analogous to that which was contemplated by the founder; and that whenever, on the like account, the court shall think fit to dispense with any statute or provision as far as relates to the qualification of any schoolmaster or under master, the court shall substitute such qualification as will provide for every object implied in the original qualification, which may be capable of being retained notwithstanding such insufficiency of the revenues."

[Sect. 6. "That in case the appointment of any additional schoolmaster or under master shall be found necessary for the purpose of carrying the objects of this act into execution, the court shall require the same qualification in such new schoolmaster or under master respectively as may be required by the existing statutes in the present schoolmaster or under master, except such as may be wholly referable to their capability of giving instruction in any particular branch of education; but that every other qualification implied in the qualification of the original schoolmaster or under master, and capable of being retained, shall be retained and required in such new schoolmaster or under master; and the court shall also in such case declare in whom the appointment of such new schoolmaster or under master shall be vested, so as to preserve as far as may be the existing rights of all parties with regard to patronage."

[Sect. 7. "That although under the provisions hereinbefore contained the teaching of Greek or Latin in any grammar school may be dispensed with, every such school, and the masters thereof, shall be still considered as grammar schools and grammar schoolmasters, and shall continue subject to the jurisdiction of the ordinary as heretofore; and that no person shall be authorized to exercise the office of schoolmaster or under master therein without having such licence, or without having made such oath, declaration, or subscription as may be required by law of the schoolmasters or under masters respectively of other grammar schools."

[Sect. 8. "That whenever the court shall think fit to extend the freedom of or the right of admission into any grammar school, such extension shall be so qualified by the court that none of the boys who are by the foundation or existing statutes entitled to such privilege shall be excluded, by the admission of other boys into the said school, either from such school itself or from competition for any exhibition or other advantage connected therewith."

[Sect. 9. "That in case there shall be in any city, town, or place any grammar school or grammar schools, the revenues of which shall of themselves be insufficient to admit of the purposes of their founder or founders being effected, but which revenues if joined to the revenues of any other grammar school or grammar schools in the same city, town, or place would afford the means of effecting the purposes of the founders of such several schools, it shall be lawful for the Court of Chancery to direct such schools to be united, and the revenues of the schools so united to be applied to the support of one school to be formed by such union, and which shall be carried on according to a scheme to be settled for that

purpose under the direction of the said court: provided always, that before application shall be made to the court to direct such union the consent of the visitor, patron, and governors of every school to be affected thereby shall be first obtained."

3 & 4 Vict.
c. 77.

Consents
necessary
to Union.

[Sect. 10. "That no new statutes affecting the duties or emoluments of any schoolmaster or under master shall be brought into operation as regards any such master who shall have been appointed previously to the passing of this act without his consent in writing; but that in case any such schoolmaster or under master as last aforesaid shall be unwilling to give such consent as aforesaid, and shall be desirous or willing to resign his office on receiving a retiring pension, it shall be lawful for the governors, if there be any competent to act, or if there be no such governors, for the visitor, to assign to such master such pension as to them or him (as the case may be) shall seem reasonable from the time of his resignation, which pension, if approved as hereinafter mentioned, the trustees of the said school are hereby authorized and required to pay to him, or his order, according to the terms of such assignment."

Present
School-mas-
ters not to be
affected, but
to be at liber-
ty to resign
on receiving
Pensions.

[Sect. 11. "That any schoolmaster appointed in any grammar school after the passing of this act shall receive his appointment subject to such new statutes as may be made and confirmed by the Court of Chancery, in pursuance of any proceedings which may be commenced under this act, within six months after such vacancy shall have occurred."

How new
Appointment
of Master to
be made.

[Sect. 12. "That the term on the expiration of which any right of nomination or appointment of the master in any grammar school would otherwise lapse shall, on the first avoidance of the office which shall occur after the passing of this act, be computed from the time of the confirmation of the new statutes by which the school is to be in future governed, or if no proceedings are pending for the purpose of having statutes established from the expiration of the time within which such proceedings may be instituted, and not from the time of the avoidance."

Lapse of
Right of No-
mination of
Master shall
take place
from Time of
settling the
new Statutes.

[By sect. 24, certain foundations are exempted from the operation of this act, viz. "the universities of Oxford or Cambridge, or any college or hall within the same, or the university of London, or any colleges connected therewith, or the university of Durham, or the colleges of Saint David's or Saint Bee's, or the grammar schools of Westminster, Eton, Winchester, Harrow, Charter House, Rugby, Merchant Taylors, Saint Paul's, Christ's Hospital, Birmingham, Manchester (s), or Macclesfield, or Louth, or such schools as form part of any cathedral or collegiate church."

Exemptions
from this act.

[See the remaining sections of the statute at the close of this chapter.

[IV. *Ecclesiastical Jurisdiction over Grammar Schools.*

[Queen Elizabeth, in an injunction set forth in the first year of her reign, ordains that "no man shall take upon him to teach, but such as shall be allowed by the *ordinary*, and found

(s) [*Vide post*, a recent decision in the Court of Chancery, respecting the Free School of Manchester.]

meet as well for learning and dexterity in teaching, as for sober and honest conversation, and also for right understanding of God's true religion (*t*)."—ED.]

Licence,
by Canon 77.

By canon 77, no man shall teach either in public school or private house, but such as shall be allowed by the bishop of the diocese, or ordinary of the place, under his hand and seal; being found meet, as well for his learning and dexterity in teaching, as for sober and honest conversation, and also for right understanding of God's true religion; and also, except he first subscribe simply to the first and third articles in the thirty-sixth canon, concerning the king's supremacy and the Thirty-Nine Articles of religion, and to the two first clauses of the second article concerning the Book of Common Prayer, viz. that it containeth nothing contrary to the word of God, and may lawfully be used.

And in the case of *Cory v. Pepper*, T., 30 Car. 2, a consultation was granted in the Court of King's Bench, against one who taught without licence in contempt of the canons; and (the reporter says) the reason given by the court was, that the canons of 1603 are good by the statute of the 25 Hen. 8, so long as they do not impugn the common law, or the prerogative royal (*u*).

But this is unchronological and absurd: and as the office of a schoolmaster is a lay office (for where it is supplied by a clergyman, that is only accidental, and not of any necessity at all), it is clear enough, that the canon by its own strength in this case is not obligatory.

Therefore we must seek out some other foundation of the ecclesiastical jurisdiction: and there are many quotations for this purpose fetched out of the ancient canon law (*v*); which, although perhaps not perfectly decisive, yet it must be owned they bear that way.

The argument in Cox's case seemeth to contain the substance of what hath been alleged on both sides in this matter, and concludeth in favour of the ecclesiastical jurisdiction; which was thus, M., 1700, in the Chancery. Cox was libelled against in the spiritual court at Exeter, for teaching school without licence from the bishop; and on motion before the lord chancellor, an order was made that cause should be shown why a prohibition should not go, and that in the meantime all things should stay. On showing cause, it was moved to discharge the said order, alleging, that before the Reformation this was certainly of ecclesiastical jurisdiction (*x*); and in proof thereof,

By Council of was cited the 11th canon of the council of Lateran, held in the

(*t*) [Spar. Col. p. 78; Inj. 40; Gibson's Cod. vol. ii. p. 1099, note.]

(*u*) 2 Lev. 222; Gibs. 995.

(*v*) Gibs. 1099.

(*x*) [*I.e.* the 4th Council of La-

teran. See "Councils," and s. xviii. of 3rd Council of Lateran, A. D. 1179, p. 1518, v. x. fol. ed. of Councils, printed at Paris, and remarks in preface to this chapter.—ED.]

year 1215, which canon hath been received by custom in this kingdom, and so made part of our ecclesiastical laws; that the statute of the 1 Eliz. c. 1, having restored the spiritual jurisdiction to the crown, which had been usurped by the pope, immediately thereupon the queen set forth ecclesiastical injunctions, one of which was, that no man should teach school without being allowed thereto by the ordinary; that it must be admitted, these injunctions were not confirmed by any act of parliament, but their being referred to and mentioned in the 5 Eliz. c. 1, was an argument that the legislature did not approve them; that in the 12th year of that queen, the said injunctions (and amongst them, this of teaching school without licence from the ordinary) were, by the convocation then sitting, turned into canons; that afterwards the statute of the 23 Eliz. c. 1, was the first statute that prohibited it; since which, two others had followed, but none of them tended to destroy the ecclesiastical jurisdiction, only, by making the offence punishable in both courts, gave a remedy where there was none before; that in the first year of King James, the convocation met, which reduced all the canons into one body, and then particularly made this canon, that none should teach school without licence from the ordinary; and though it might be difficult to prove that these canons were directly confirmed by act of parliament, yet there was a sort of confirmation of them in the statute of the 4 Jac. 1, c. 7, for the founding and incorporating a free grammar-school at North-Leech in the county of Gloucester, whereby the provost and scholars of Queen's College in Oxford were to nominate the schoolmaster and usher of the said school, and to make such ordinances for the government thereof as they should see meet, so that the same were not repugnant to the king's prerogative, to the laws and statutes of the realm, or to any ecclesiastical canons or constitutions of the Church of England. But on the other side, it was answered, that there could not be one canon or precedent before the Reformation cited to prove the keeping of school to be of ecclesiastical cognizance; for that supposing the council of Lateran to have been in every part thereof received in England, yet the canon cited did not prove the point for which it had been produced, that canon only appointing schoolmasters in every cathedral church, and such schoolmasters to be licensed by the bishop; which was but reasonable, namely, that he who taught in the bishop's church should be approved of by the bishop; that the teaching of school was not in the nature thereof spiritual; and it would be hard to affirm that it was of ecclesiastical jurisdiction, or cognizable by the old ecclesiastical laws of the kingdom received by common use, at the same time that not one single precedent of any such law or usage before the Reformation was to be found; and that as to the canons made since, they did not bind a layman (as Cox was suggested

Lateran and
by Statute
Law.

Ecclesiastical
Jurisdiction
over Schools.

Over what
Schools the
Ecclesiastical
Court has Ju-
risdiction.

to be), because the laity were not represented in convocation; neither could a reference to the canons in a private act of parliament add any greater weight to them than they had before; that this was a case which deserved great consideration, having before been in the other courts of Westminster-hall, where several prohibitions had been granted on this very same point, in order that it might receive a judicial determination, but the other side would never venture to go on; as in *Oldfield's case*, M., 9 Will. 3; the case of *Belcham v. Barnardiston*, E., 10 Will. 3 (y); *Chedwick's case*, M., 10 Will. 3; *Scorier's case*, T., 11 Will. 3; and one *Davison's case*, T., 12 Will. 3 (z); that supposing it to have originally been a spiritual crime, yet being now made temporal by several acts of parliament, it was thereby drawn from the spiritual to the temporal jurisdiction. By Wright, Lord Keeper: "Both courts may have a concurrent jurisdiction; and a crime may be punishable both in the one and in the other: the canons of a convocation do not bind the laity without an act of parliament; but I always was, and still am of opinion, that keeping of school is by the old laws of England of ecclesiastical cognizance: and therefore let the order for a prohibition be discharged." Whereupon it was moved, that this libel was for teaching school generally, without shewing what kind of school; and the Court Christian could not have jurisdiction of writing schools, reading schools, dancing schools, or such like (a). To which the lord keeper assented, and thereupon granted a prohibition as to the teaching of all schools, except grammar schools, which he thought to be of ecclesiastical cognizance. (b)

[This power of the ordinary is confirmed and strengthened by s. 15 of 3 & 4 Vict. c. 77, which provides,

Where no
such Powers,
Court may
create them.

"That in all cases in which no authority to be exercised by way of visitation in respect of the discipline of any grammar-school is now vested in any known person or persons, it shall be lawful for the bishop of the diocese wherein the same is locally situated to apply to the Court of Chancery, stating the same; and the said court shall have power, if it so think fit, to order that the said bishop shall be at liberty to visit and regulate the said school in respect of the discipline thereof, but not further or otherwise."

Saving of
Rights of
Ordinary.
Certain Foun-
dations ex-
empted from
this Act.

[Sect. 24. "Provided always, that neither this act nor any thing therein contained shall be any way prejudicial or hurtful to the jurisdiction or power of the ordinary, but that he may lawfully execute and perform the same as heretofore he might according to the statutes, common law, and canons of this realm, and also as far as he may be further empowered by this act; and that this act shall not be construed as extending to any of the following institutions; (that is to say), to the Universities of Oxford or Cambridge,

(y) Vide infra.

(z) 1 Salk. 105.

(a) [It was said, in *Rector, &c. of St. George's, Hanover Square, v. Stuart*,

Stra. 1126, that a charity-school is not within ecclesiastical cognizance. See s. vi. of this chapter.—Ed.]

(b) 1 P. Will. 29.

or to any college or hall within the same, or to the University of London, or any colleges connected therewith."

[Among the articles preserved in Strype's Memorials of Archbishops' Visitations, the following is of constant occurrence:—

["Item. Whether your grammar school be well ordered; whether the number of children thereof be furnished; how many wanted, and by whose default? Whether they be diligently and godly brought up in the fear of God and wholesome doctrine; whether any of them have been received for money or rewards, and by whom? Whether the statute foundations, and other ordinances touching the said grammar-school, the schoolmaster, or the scholars thereof, or any other having or doing therein, be kept? By whom it is not observed, or by whose fault? And the like in all points you shall require and present such your chorists and their master."

[*The Form of a Certificate for obtaining a Licence to teach a Grammar-School is as follows:*

[*To the worshipful J. R., Doctor of Laws, Vicar General and Official Principal of the Right Rev. Father in God, Thomas, by Divine permission Lord Bishop of London.*

Form of Certificate for obtaining a Licence to teach a Grammar-School.

[*These are to certify, that J. P., of Cheshunt, in the county of Hertford and diocese of London, aged sixty years, is a person well known unto us, and is of sober life and conversation, and conformable to the doctrine and discipline of the Church of England as by law established, and is well affected to his present majesty King George the Second; and, as we humbly apprehend, fitly qualified to obtain a licence for teaching grammar. As witness our hands, this third day of January, 1760.*

S. P., Clerk.

S. R., Clerk.

T. C., Clerk.

[*Articles against a Person for teaching a Grammar-School.*

[*In the name of God, amen. We, E. S., Doctor of Laws, Vicar-General and Official Principal of the Consistorial and Episcopal Court of the Right Rev. Father in God, Thomas, by Divine permission Lord Bishop of London, lawfully appointed, do give in, object and article against you, I. N., clerk, curate of Ware, in the county of Hertford and diocese of London, all and singular the under-written articles and interrogatories concerning your soul's health and reformation of manners, and especially for teaching and instructing boys within the parish and jurisdiction aforesaid, in the grammar tongue, without licence from the ordinary first had and obtained, at the promotion of the said Rev. W. A., clerk, master of the free and endowed grammar-school of Ware aforesaid.*

Articles against a Person for teaching a Grammar-School.

[*First. We article and object to you, the said I. N., that by the laws and constitutions ecclesiastical of this realm, and more especially in the 77th canon (among other things), it is ordained and provided, that*

Articles
against a
Person for
teaching a
Grammar-
School.

"no person shall teach, either in public school or private house, but such as shall be allowed by the bishop of the diocese, ordinary of the place, under his hand and seal;" and also in the 78th canon (among other things), it is ordained and provided, "that where there is a public school founded in any parish in county towns, no person shall teach grammar but only him that is allowed for the said public school." And we article and object to you every thing in this article jointly and severally.

[Second. Also we article and object to you, the said I. N., that notwithstanding the premises in the next precedent article mentioned, you, the said I. N., in the months of June, July, August, September, October, November, December, and January, in the present year of our Lord, 1746, in all, some or one of the said months, have, in the town of Ware aforesaid, and within the jurisdiction aforesaid, taught the grammar tongue to boys, without having a licence or faculty from us or our surrogate, or from any other competent judge, for the teaching and instructing of boys the said tongue, contrary to the canons and constitutions aforesaid; and this was and is true, public and notorious, and we article and object to you of any other time or times, place or places, and as before.

[Third. Also we article and object to you, the said I. N., that by reason of your teaching and instructing boys in the grammar tongue, without licence first had and obtained from the proper ordinary, you are subject to ecclesiastical cognizance, and are to be canonically admonished for the same, and compelled to desist therefrom, according to the exigency of the law; and we article and object as above.

[Fourth. Also we article and object to you, the said I. N., that you are of Ware, in the county of Hertford and diocese of London, and, by reason thereof, notoriously subject to the jurisdiction of this court; and we article and object to you as above.

[Fifth. Also we article and object to you, the said I. N., that all and singular the premises were and are true, public and notorious, and thereof there was and is a public voice, fame and report, and of which legal proof being made, right and justice ought effectually to be administered in the premises, and you, the said I. N., ought to be admonished to desist from practising and teaching grammar-schools within the diocese aforesaid, and to be condemned in the costs made or to be made in this cause, on behalf of the said W. A., the promoter aforesaid, and compelled to the due payment thereof by us, and our definitive sentence of final decree to be given in this cause, and further to do in the premises what shall be lawful in this behalf, and so forth."—ED.]

By act of parliament the case stands thus:—

23 Eliz. c. 1.

By the 23 Eliz. c. 1, "If any person or persons, body politic or corporate, shall keep or maintain any schoolmaster which shall not repair to some church, chapel, or usual place of common prayer to be allowed by the bishop or ordinary of the diocese where such schoolmaster shall be so kept, he shall, upon conviction in the courts at Westminster, or at the assizes, or quarter sessions of the peace, forfeit for every month so keeping him 10*l.*, one-third to the king, one-third to the poor, and one-third to him that shall sue; and such schoolmaster or teacher presuming to teach contrary to this act, and being thereof lawfully convict, shall be disabled to be a teacher of

youth, and suffer imprisonment without bail or mainprize for one year."

The following case seemeth to have happened upon this statute, which, in the adjudication, by some oversight, hath not been attended to, viz. E., 13 W.3, *The King v. Douse*(b). The defendant was indicted for having kept a school without licence of the bishop of the diocese, against the form of the statute. Upon which it was moved to quash the indictment (being removed into the King's Bench by *certiorari*), and the exceptions taken to the indictment were:—1. That there was no statute that prohibited keeping school without licence, but the 1 Jac. 1, c.4, s.9, and the said act prescribed another method of proceeding; 2. This indictment was found before the justices of the peace at the quarter sessions, and they have no power by the act, and therefore it was void; 3. This school was not within the act of the 1 Jac. 1, because the act extends but to grammar-schools, and this school was for writing and reading. And afterwards, after a rule made to show cause, the indictment was quashed.

Case of *The King v. Douse*.

Further, by the 1 Jac. 1, c.4, s.9, "No person shall keep any school, or be a schoolmaster out of any of the universities or colleges of this realm, except it be in some public or free grammar-school, or in some such nobleman's or gentleman's house as are not recusants, or where the same schoolmaster shall be specially licensed thereunto by the archbishop, bishop, or guardian of the spiritualities of that diocese, upon pain that as well the schoolmaster, as also the party that shall retain or maintain any such schoolmaster, shall forfeit, each of them, for every day so wittingly offending, 40s., half to the king, and half to him that shall sue."

1 Jac. 1.

And by the 13 & 14 Car. 2, c. 4, ss. 8, 9, 10, 11, "Every schoolmaster keeping any public or private school, and every person instructing or teaching any youth in any house or private family as a tutor or schoolmaster shall, before his admission, subscribe the declaration following, viz. :—

13 & 14 Car. 2, Subscription by Schoolmasters.

I, A. B. do declare that I will conform to the Liturgy of the Church of England as it is now by law established.

Which shall be subscribed before the archbishop, bishop, or ordinary of the diocese, on pain that every person so failing in such subscription, shall forfeit his school, and be utterly disabled and *ipso facto* deprived of the same, and the said school shall be void as if such person so failing were naturally dead; and if any schoolmaster, or other person, instructing or teaching youth in any private house or family as a tutor or schoolmaster, shall instruct or teach any youth as a tutor or schoolmaster, before licence obtained from the archbishop, bishop, or ordinary of the diocese, according to the laws and

(b) Ld. Raym. 672; [and 6 T. R. 490.]

statutes of this realm, (for which he shall pay 12*d.* only), and before such subscription as aforesaid, he shall for the first offence suffer three months' imprisonment without bail, and for every second, and other such offence, shall suffer three months' imprisonment without bail, and also forfeit to the king the sum of 5*l.*"

The Ordinary
may refuse
to grant
Licence ;

M., 9 Geo. 2, *The King v. The Bishop of Lichfield and Coventry* (commonly called *Rushworth's case* (c)). A mandamus issued to the bishop, to grant a licence to Rushworth, a clergyman, who was nominated usher of a free grammar-school within his diocese. To which he returned, that a caveat had been entered by some of the principal inhabitants of the place, with articles annexed, accusing him of drunkenness, incontinency, and neglect of preaching and reading prayers; and that the caveat being warned, he was proceeding to inquire into the truth of these things when the mandamus came, and therefore he had suspended the licensing him; and without entering much into the arguments, whether the bishop hath the power of licensing, the court held, that the return should be allowed as a temporary excuse, for though the act of the 13 & 14 Car. 2, c. 4, obligeth them only to assent to and subscribe the declaration, yet it adds, *according to the laws and statutes of this realm*, which presupposeth some necessary qualifications, which it is reasonable should be examined into (d).

and may ex-
amine a
Schoolmaster
applying for
a Licence as
to his Mo-
rality, Re-
ligion, and
Learning.

The ordinary may also examine the party applying for a licence to teach a grammar-school as to his *learning*, as well as his morality and religion; and it is a good return to a mandamus to the ordinary to grant a licence, to state that he suspended the granting of it until the party would submit himself to be examined "touching his sufficiency in learning (e)."

[Cathedral and collegiate schools are expressly exempted from the operation of 3 & 4 Vict. c. 77.—ED.]

After licence obtained, the schoolmaster must take the oaths, and exhibit a certificate of his having received the sacrament, at the quarter sessions, as other persons qualifying for offices. He must also take the oaths, and sign such of the oaths and declarations, required by the 13 & 14 Car. 2, c. 4, s. 8, and 25 Car. 2, c. 2, s. 2, as are not abolished, and the new oath, or oaths, substituted in lieu thereof, and receive the sacrament within three months after admission; the oaths seem to be the oaths of allegiance, abjuration, and supremacy. If not qualified, he is *ipso facto* deprived, notwithstanding a peremptory mandamus had been granted for restoring him (f).

137th Canon.

And by can. 137, "Every schoolmaster shall, at the bishop's first visitation, or at the next visitation after his admission, ex-

(c) Str. 1023.

(d) [*Rushworth v. Mason*, Com. 448.]

(e) *Rex v. Archbishop of York*, 6

Term Rep. 490 [*Withnell's case*.]

(f) Serj. Hill's MSS. [See title Oaths.]

hibit his licence, to be by the said bishop either allowed, or (if there be just cause) disallowed and rejected.

[For Roman Catholic schoolmasters and dissenting schoolmasters, see titles *Papery* and *Dissenters*.—ED.]

In *Bale's case* (g), M., 21 Car. 2, it was held, that where the patronage is not in the ordinary, but in feoffees or other patrons, the ordinary cannot put a man out; and a prohibition was granted, the suggestion for which was, that he came in by election, and that it was his freehold.

Whether the Ordinary may proceed to Deprivation for teaching without Licence.

Upon which Dr. Gibson justly observes, that if this be any bar to his being deprived by ordinary authority, the presentation to a benefice by a lay patron, and the parson's freehold in that benefice, would be as good a plea against the deprivation of the parson by the like authority; and yet this plea hath been always rejected by the temporal courts: and in one circumstance at least, the being deprived of a school, notwithstanding the notion of a freehold, is more naturally supposed, than deprivation of a benefice, because the licence to a school is only during pleasure, whereas the institution to a benefice is absolute and unlimited (h).

[It is enacted by 4 & 5 Vict. c. 38,—

Under 4 & 5 Vict. c. 38.

[Sect. 17. "That no schoolmaster or schoolmistress to be appointed to any school erected upon land conveyed under the powers of this act shall be deemed to have acquired an interest for life by virtue of such appointment, but shall, in default of any specific engagement, hold his office at the discretion of the trustees of the said school."

No Schoolmaster is to acquire a Life Interest by virtue of his Appointment.

[Sect. 18. "And for the more speedy and effectual recovery of the possession of any premises belonging to any school which the master or mistress who shall have been dismissed, or any person who shall have ceased to be master or mistress, shall hold over after his or her dismissal or ceasing to be master or mistress, be it enacted, That when any master or mistress, not being the master or mistress of any grammar-school within the provision of the act of the last session of parliament hereinafter mentioned, holding any schoolroom, schoolhouse, or any other house, land, or tenement, by virtue of his or her office, shall have been dismissed or removed, or shall have ceased to be master or mistress, and shall neglect or refuse to quit and deliver up possession of the premises within the space of three calendar months after such dismissal or ceasing to be master or mistress, not having any lawful authority for retaining such possession, it shall be lawful for the justices of the peace acting for the district or division in which such premises are situated, in petty sessions assembled, or any two of them, or for the sheriff of the county in Scotland, and they are hereby required, on the complaint of the trustees or managers of the said school, or some one of them, on proof of such master or mistress having been dismissed or removed, or having ceased to be such master or mistress, to issue a warrant under their hands and seals, or under the hand of such sheriff in Scot-

Justices of the Peace or Sheriffs are to give Possession of Schoolrooms, &c. in case of the Refusal of the Master.

(g) 2 Keb. 544.

(h) Gibs. 1110.

4 & 5 Vict.
c. 38.

land, to some one or more of the constables and peace officers of the said district or division, or of the sheriff's officers in Scotland, commanding him or them, within a period to be therein named, not less than ten nor more than twenty-one clear days from the date of such warrant, to enter into the premises, and give possession of the same to the said trustees or managers or their agents, such entry and possession being given in England in such manner as justices of the peace are empowered to give possession of any premises to any landlord or his agent under an act passed in the second year of the reign of her present Majesty, intituled, 'An Act to facilitate the Recovery of Possession of Tenements after due Determination of the Tenancy' (h)."—ED.]

In what case
Curates shall
have the pre-
ference in
teaching
Schools.

By can. 78, "In what parish church or chapel soever there is a curate which is a master of arts, or bachelor of arts, or is otherwise well able to teach youth, and will willingly so do, for the better increase of his living, and training up of children in principles of true religion, we will and ordain, that a licence to teach youth of the parish where he serveth, be granted to none by the ordinary of that place, but only to the said curate: provided always, that this constitution shall not extend to any parish or chapel in country towns, where there is a public school founded already, in which case, we think it not meet to allow any to teach grammar, but only him that is allowed for the said public school."

Inhibitions
to School-
masters.

["In the records of the see of Canterbury" (says Bishop Gibson), "I find two inhibitions to schoolmasters not to teach school *in præjudicium liberæ scholæ*, one in the time of Archbishop Bancroft, and the other in the time of Archbishop Laud (i)."]

[The 1 & 2 Vict. c. 106, which inflicts penalties on beneficed clergymen who engage in trade or buy to sell again for profit and trade, provided by sect. 30, "that nothing hereinbefore contained shall subject to any penalty or forfeiture any spiritual person for keeping a school or seminary, or acting as a schoolmaster or tutor or instructor, or being in any manner concerned or engaged in giving instruction or education for profit or reward, or for buying or selling or doing any other thing in relation to the management of any such school, seminary, or employment." See title **Privileges and Restraints of the Clergy**.—ED.]

Order to be
observed
therein.
79th Canon.

By can. 79, "All schoolmasters shall teach in English or Latin, as the children are able to bear, the larger or shorter catechism, heretofore by public authority set forth. And as often as any sermon shall be upon holy and festival days, within the parish where they teach they shall bring their scholars to the church where such sermon shall be made, and there see them quietly and soberly behave themselves, and shall examine

(h) [1 & 2 Vict. c. 74.]

(i) [Vol. ii. 1101, and see in his
Appendix, sect. xix. p. 1571, a col-

lection of instruments relating to
schools.—ED.]

them at times convenient after their return, what they have borne away of such sermons. Upon other days, and at other times, they shall train them up with such sentences of holy Scriptures as shall be most expedient to induce them to all godliness. And they shall teach the grammar set forth by King Henry VIII. and continued in the times of King Edward VI. and Queen Elizabeth of noble memory, and none other. And if any schoolmaster, being licensed, and having subscribed as is aforesaid, shall offend in any of the premises, or either speak, write or teach against any thing whereunto he hath formerly subscribed, if upon admonition by the ordinary he do not amend and reform himself, let him be suspended from teaching school any longer."

The larger or shorter Catechism.—The larger is that in the Book of Common Prayer; the shorter was a catechism set forth by Edward VI., which he, by his letters patent, commanded to be taught in all schools, which was examined, reviewed and corrected in the convocation of 1562, and published with those improvements in 1570, to be a guide to the younger clergy in the study of divinity, as containing the sum and substance of our reformed religion (*j*).

Shall bring their Scholars to the Church.—E., 10 & 11 Will. 3, *Belcham v. Barnardiston* (*k*). The chief question was, whether a schoolmaster might be prosecuted in the ecclesiastical court for not bringing his scholars to church, contrary to this canon. And it was the opinion of the court, that the schoolmaster, being a layman, was not bound by the canons. But this decision seems scarcely reconcileable with the admission of the temporal courts, that "keeping of schools is of ecclesiastical cognizance" (*l*).

Grammar.—Compiled and set forth by William Lilly and others specially appointed by his majesty, in the preface to which book it is declared, that "as for the diversity of grammars, it is well and profitably taken away by the king's majesty's wisdom, who, foreseeing the inconvenience, and favourably providing the remedy, caused one kind of grammar by sundry learned men to be diligently drawn, and so to be set out only, every where to be taught for the use of learners, and for avoiding the hurt in changing of schoolmasters."

[V. Sites for Schools.

[*The Rector, &c. of St. George v. Steuart* (*m*). "The parish was cited to appear in the Bishop of London's Court, to show cause why a licence should not be granted to Mr. Steuart, to erect a *charity-school* on part of the churchyard. And upon

Prohibition
to a Suit for
building
Charity-
School in
Churchyard.

(*j*) Gibs. 374.

(*k*) 1 P. Will. 32.

(*l*) [Per Lord Keeper Wright,
Cox's case, 1 P. W. 29.]

(*m*) [2 Strange's Rep. 1126.]

motion of the rector and parishioners a prohibition was granted, for the ecclesiastical court has nothing to do with this, and cannot compel them without their consent."

[But this solitary case can scarcely be held to oust the ecclesiastical court of a jurisdiction which it must have long possessed, for, as has been seen in the prefatory remarks to this chapter, all schools were probably originally built in consecrated ground, — and, it should seem, the discretionary powers exercised in the grant of faculties by these courts render them very competent to decide whether or not the right of the parishioners would be injured by the erection of a school in the churchyard.

3 & 4 Vict.
c. 60; Lands
for School
Sites.

[The 3 & 4 Vict. c. 60, s. 19, empowered the commissioners for building new churches to apply land in any parish granted to them for any of the purposes of the church building acts, for the purpose of any parochial or charitable school. This power was extended by sect. 19 of the 4 & 5 Vict. c. 38, as will be seen below.

6 & 7 Will. 4,
c. 70; Con-
veyances of
Sites for
Schools.

[On the 13th of August, 1836, the 6 & 7 Will. 4, c. 70, was passed, "To facilitate the Conveyance of Sites for Schools;" but on the 21st of June, 1841, it was repealed by 4 & 5 Vict. c. 38, which, however, provided, that all matters and things done in pursuance of the said act shall be and remain valid, as though the said act was not repealed; and all matters and things commenced in pursuance of the said act shall be continued according to the provisions of this act, if the same shall be applicable, otherwise shall be continued conformably to the said recited act, which shall be deemed to be still in force with regard to such proceedings.

[The most convenient arrangement of the provisions of this act seems to be as follows:—

4 & 5 Vict.
c. 38.

Landlords
empowered
to convey
Land to be
used as Sites
for Schools,
&c.

[1. *Persons and Bodies empowered to convey.*

[Sect. 2. "That any person, being seised in fee simple, fee tail, or for life, of and in any manor or lands of freehold, copyhold, or customary tenure, and having the beneficial interest therein, or in Scotland, being the proprietor in fee simple or under entail, and in possession for the time being, may grant, convey, or enfranchise by way of gift, sale or exchange, in fee simple or for a term of years, any quantity not exceeding one acre of such land, as a site for a school for the education of poor persons, or for the residence of the schoolmaster or schoolmistress, or otherwise for the purposes of the education of such poor persons in religious and useful knowledge; provided that no such grant made by any person seised only for life of and in any such manor or lands shall be valid, unless the person next entitled to the same in remainder, in fee simple or fee tail, (if legally competent,) shall be a party to and join in such grant: provided also, that where any portion of waste or commonable land shall be gratuitously conveyed by any lord or lady of a manor for any such purposes as aforesaid, the rights and interests of all persons in the said land shall be barred and divested

by such conveyance: provided also, that upon the said land so granted as aforesaid, or any part thereof, ceasing to be used for the purposes in this act mentioned, the same shall thereupon immediately revert to and become a portion of the said estate held in fee simple or otherwise, or of any manor or land as aforesaid, as fully to all intents and purposes as if this act had not been passed, any thing herein contained to the contrary notwithstanding.

4 & 5 Vict.
c. 38.
*Who may
convey Sites
for Schools.*

[Sect. 3. "And whereas it may be expedient and proper that the chancellor and council of her Majesty's duchy of Lancaster, on her Majesty's behalf, should be authorized to grant, convey, or enfranchise, to or in favour of the trustee or trustees of any existing or intended school, lands and hereditaments belonging to her Majesty in right of her said duchy, for the purposes of this act; be it therefore enacted, That it shall and may be lawful for the chancellor and council of her Majesty's duchy of Lancaster for the time being, by any deed or writing under the hand and seal of the chancellor of the said duchy for the time being, attested by the clerk of the council of the said duchy for the time being, for and in the name of her Majesty, her heirs and successors, to grant, convey, or enfranchise, to or in favour of such trustee or trustees, any lands and hereditaments to be used by them for the purposes of this act, upon such terms and conditions as to the said chancellor and council shall seem meet; and where any sum or sums of money shall be paid as or for the purchase or consideration for such lands or hereditaments so to be granted, conveyed, or enfranchised as aforesaid, the same shall be paid by such trustee or trustees into the hands of the receiver general for the time being of the said duchy, or his deputy, and shall be by him paid, applied, and disposed of according to the provisions and regulations contained in an act passed in the forty-eighth year of the reign of his late majesty King George the Third, intituled, 'An Act to improve the Land Revenue of the Crown in England, and also of his Majesty's Duchy of Lancaster,' or any other act or acts now in force for that purpose: provided always, that upon the said land so granted as aforesaid, or any part thereof, ceasing to be used for the purposes in this act mentioned, the same shall thereupon immediately revert to and become again a portion of the possessions of the said duchy, as fully to all intents and purposes as if this act or any such grant as aforesaid had not been passed or made; any thing herein contained to the contrary notwithstanding.

Chancellor
and Council
of the Duchy
of Lancaster
empowered
to grant
Lands to the
Trustees of
any existing
or intended
School.

48 Geo. 3,
c. 73.

If Lands
cease to be
used for the
Purposes of
the Act they
shall revert.

[Sect. 4. "That for the purposes of this act only, and for such time only as the same shall be used for the purposes of this act, it shall be lawful for any two of the principal officers of the duchy of Cornwall, under the authority of a warrant issued for that purpose under the hands of any three or more of the special commissioners for the time being for managing the affairs of the duchy of Cornwall, or under the hands of any three or more of the persons who may hereafter for the time being have the immediate management of the said duchy, if the said duchy shall be then vested in the crown, or if the said duchy shall then be vested in a duke of Cornwall, then under the hand of the chancellor for the time being of the said duchy, or under the hands of any three or more of the persons for the time being having the immediate management of

Officers of
the Duchy of
Cornwall
empowered
upon suffi-
cient autho-
rity, to grant
Lands to the
Trustees of
any existing
or intended
School.

4 & 5 Vict.
c. 38.

*Who may
convey Sites
for Schools.*

If Lands
cease to be
used for the
purposes of
the Act they
shall revert.

Persons
under Dis-
ability em-
powered to
convey Lands
for the pur-
poses of this
Act.

Corporations,
Justices,
Trustees, &c.
empowered
to convey
Lands for the
purposes of
this Act.

5 & 6 W. 4,
c. 69.

the said duchy, by deed under their hands, to grant and convey to the trustees or trustee for the time being of any existing school, or of any school intended to be established by virtue of this act, any lands, tenements, or hereditaments forming part of the possessions of the said duchy of Cornwall, not exceeding in the whole one acre in any one parish, upon such terms and conditions as to the said special commissioners or chancellor, or such other persons as aforesaid, shall seem meet: Provided always, that upon the said land so granted as aforesaid, or any part thereof, ceasing to be used for the purposes in this act mentioned, the same shall thereupon immediately revert to and become again a portion of the possessions of the said duchy, as fully to all intents and purposes as if this act or any such grant as aforesaid hath not been passed or made; any thing herein contained to the contrary notwithstanding."

[Sect. 5. "That where any person shall be equitably entitled to any manor or land, but the legal estate therein shall be in some trustee or trustees, it shall be sufficient for such person to convey the same for the purposes of this act without the trustee or trustees being party to the conveyance thereof; and where any married woman shall be seised or possessed of or entitled to any estate or interest, manorial or otherwise, in land proposed to be conveyed for the purposes of this act, she and her husband may convey the same for such purposes by deed without any acknowledgment thereof; and where it is deemed expedient to purchase any land for the purposes aforesaid belonging to or vested in any infant or lunatic, such land may be conveyed by the guardian or committee of such infant, or the committee of such lunatic respectively, who may receive the purchase-money for the same, and give valid and sufficient discharges to the party paying such purchase-money, who shall not be required to see to the application thereof."

[Sect. 6. "That (*m*) it shall be lawful for any corporation, ecclesiastical or lay, whether sole or aggregate, and for any officers, justices of the peace, trustees, or commissioners, holding land for public, ecclesiastical, parochial, charitable, or other purposes or objects, subject to the provisions next hereinafter mentioned, to grant, convey, or enfranchise, for the purposes of this act, such quantity of land as aforesaid in any manner vested in such corporation, officers, justices, trustees, or commissioners: Provided always, that no ecclesiastical corporation sole, being below the dignity of a bishop, shall be authorized to make such grant without the consent in writing of the bishop of the diocese to whose jurisdiction the said ecclesiastical corporation is subject: Provided also, that no parochial property shall be granted for such purposes without the consent of a majority of the rate-payers and owners of property in the parish to which the same belongs, assembled at a meeting to be convened according to the mode pointed out in the act passed in the sixth year of the reign of his late majesty, intituled 'An Act to facilitate the Conveyance of Workhouses and other Property of Parishes and of Incorporations or Unions of Parishes in England and Wales,' and without the consent of the poor law commissioners, to be testified by their seal being affixed to the

(*m*) [By these words colleges were enabled to convey sites for schools which was doubtful under the repealed act of 6 & 7 Will. 4, c. 70, s. 3.]

deed of conveyance, and of the guardians of the poor of the union within which the said parish may be comprised, or of the guardians of the poor of the said parish where the administration of the relief of the poor therein shall be subject to a board of guardians, testified by such guardians being the parties to convey the same; provided also that where any officers, trustees, or commissioners, other than parochial trustees, shall make any such grant, it shall be sufficient if a majority or quorum authorized to act of such officers, trustees, or commissioners, assembled at a meeting duly convened, shall assent to such grant, and shall execute the deed of conveyance, although they shall not constitute a majority of the actual body of such officers, trustees, or commissioners: Provided also, that the justices of the peace may give their consent to the making any grant of land or premises belonging to any county, riding, or division by vote at their general quarter sessions, and may direct the same to be made in the manner directed to be pursued on the sale of the sites of goals by an act passed in the seventh year of the reign of his late majesty George the Fourth, intituled 'An Act to authorize the disposal of unnecessary Prisons in England.' "

4 & 5 Vict.
c. 38.
*Who may
convey Sites
for Schools.*

7 G. 4, c. 18.

[Sect. 14. "That when any land or building shall have been or shall be given or acquired under the provisions of the said first-recited act or this act, or shall be held in trust for the purposes aforesaid, and it shall be deemed advisable to sell or exchange the same for any other more convenient or eligible site, it shall be lawful for the trustees in whom the legal estate in the said land or building shall be vested, by the direction or with the consent of the managers and directors of the said school, if any such there be, to sell or exchange the said land or building, or part thereof, for other land or building suitable to the purposes of their trust, and to receive on any exchange any sum of money by way of effecting an equality of exchange, and to apply the money arising from such sale or given on such exchange in the purchase of another site, or in the improvement of other premises used or to be used for the purposes of such trust; provided that where the land shall have been given by any ecclesiastical corporation sole the consent of the bishop of the diocese shall be required to be given to such sale or exchange before the same shall take place: provided also, that where a portion of any parliamentary grant shall have been or shall be applied towards the erection of any school, no sale or exchange thereof shall take place without the consent of the secretary of state for the home department for the time being."

Trustees
empowered
to sell or
exchange
Lands or
Buildings.

[Sect. 19. "And whereas by an act passed in the last session of parliament, intituled 'An Act to further amend the Church Building Acts,' provision was made to enable her Majesty's commissioners for building new churches to apply land in any parish granted to them for any of the purposes of the church building acts to any other ecclesiastical purposes, or for the purpose of any parochial or charitable school, or any other charitable or public purpose relating to any such parish or place: And whereas through an accidental omission such provision does not extend to cases of land granted by way of gift; be it therefore enacted, That such power so given to the said commissioners, so far as it is applicable to the purposes of any school, shall extend to every case of land granted, given, or

Powers
granted to
the Commis-
sioners under
3 & 4 Vict.
c. 60, for ap-
plying Land
to ecclesiasti-
cal Purposes
extended to
Land granted
by way of
Gift.

4 & 5 Vict.
c. 38.

conveyed to them under the authority of the several acts in the said act recited."

[2. *Grants of Land, how and to whom to be made.*

Grants of
Land may be
made to Cor-
porations or
Trustees, to
be held by
them for
School pur-
poses.

[Sect. 7. "That all grants of land or buildings, or any interest therein, for the purposes of the education of poor persons, whether taking effect under the authority of this act or any other authority of law, may be made to any corporation sole or aggregate, or to several corporations sole, or to any trustees whatsoever, to be held by such corporation or corporations or trustees for the purposes aforesaid: Provided nevertheless, that any such grant may be made to the minister of any parish being a corporation, and the churchwardens or chapelwardens and overseers of the poor, or to the minister and kirk session of the said parish, and their successors; and in such case the land or buildings so granted shall be vested for ever thereafter in the minister, churchwardens, or chapelwardens, and overseers of the poor for the time being, or the minister and kirk session of such parish, but the management, direction, and inspection of the school shall be and remain according to the provisions contained in the deed of conveyance thereof: Provided also, that where any ecclesiastical corporation sole below the dignity of a bishop shall grant any land to trustees, other than the minister, churchwardens, or chapelwardens, and overseers, for the purposes aforesaid, such trustees shall be nominated in writing by the bishop of the diocese to whose jurisdiction such corporation shall be subject; provided that where any school shall be intended for any ecclesiastical district not being a parish as hereinafter defined, it shall be sufficient if the grant be made to the minister and church or chapelwarden or wardens of the church or chapel of such district, to hold to them and their successors in office; and such grant shall enure to vest the land, subject to the conditions contained in the deed of conveyance, in such minister and the church or chapel warden or wardens for the time being."

Any number
of Sites may
be granted
for separate
Schools.

[Sect. 9. "That any person or persons or corporation may grant any number of sites for distinct and separate schools, and residences for the master or mistress thereof, although the aggregate quantity of land thereby granted by such person or persons or corporation shall exceed the extent of one acre; provided that the site of each school and residence do not exceed that extent: Provided also, that not more than one such site shall be in the same parish."

Form of
Grants, &c.

[Sect. 10. "That all grants, conveyances, and assurances of any site for a school, or the residence of a schoolmaster or schoolmistress, under the provisions of this act, in respect of any land, messuages, or buildings, may be made according to the form following, or as near thereto as the circumstances of the case will admit; (that is to say,)

"I [or we, or the corporate title of a corporation], under the authority of an act passed in the — year of the reign of her Majesty Queen Victoria, intituled 'An Act for affording further facilities for the conveyance and endowment of Sites for Schools,' do hereby freely and voluntarily, and without any valuable consideration,

[or do, in consideration of the sum of — to me or us or the said — paid,] grant, [alienate,] and convey to — all [description of the premises], and all [my or our or the right, title, and interest of the —] to and in the same and every part thereof, to hold unto and to the use of the said — and his or their [heirs, or executors, or administrators, or successors,] for the purposes of the said act, and to be applied as a site for a school for poor persons of and in the parish of — and for the residence of the schoolmaster [or schoolmistress] of the said school [or for other purposes of the said school], and for no other purpose whatever; such school to be under the management and control of [set forth the mode in which and the persons by whom the school is to be managed, directed, and inspected.] [In case the school be conveyed to trustees, a clause providing for the renewal of the trustees, and in cases where the land is purchased, exchanged, or demised, usual covenants or obligations for title, may be added.] In witness whereof the conveying and other parties have hereunto set their hands and seals, this — day of —.

4 & 5 Vict.
c. 38.

“Signed, sealed, and delivered by the said —, in the presence of — of —.

And no bargain and sale or livery of seisin shall be requisite in any conveyance intended to take effect under the provisions of this act, nor more than one witness to the execution by each party; and instead of such attestation such conveyance of any lands or heritages in Scotland shall be executed with a testing clause, according to the law and practice of Scotland; and, being recorded within sixty days of the date thereof in the general register of seisins or particular register for the county or stewartry in which the lands or heritages lie, shall, without actual seisin, be valid and effectual in law to all intents and purposes, and shall be a complete bar to all other rights, titles, trusts, interests, and incumbrances to, in, or upon the lands or heritages so conveyed.”

[3. Application of Purchase-money.

[Sect. 11. “That where any land shall be sold by any ecclesiastical corporation sole for the purposes of this act, and the purchase-money to be paid shall not exceed the sum of twenty pounds, the same may be retained by the party conveying, for his own benefit; but when it shall exceed the sum of twenty pounds it shall be applied for the benefit of the said corporation, in such manner as the bishop in whose diocese such land shall be situated shall, by writing under his hand, to be registered in the registry of his diocese, direct and appoint; but no person purchasing such land for the purpose aforesaid shall be required to see to the due application of any such purchase-money.”

Application
of Purchase-
Money for
Land sold by
any Eccle-
siastical Cor-
poration
Sole.

[Sect. 12. “That the price of any lands or heritages to be sold for the purposes of this act by any heir of entail or other incapacitated person or persons in Scotland, shall be applied and invested in such and the like manner as is directed in relation to any monies awarded to be paid for lands or heritages belonging to heirs of entail or incapacitated persons under an act passed in the first and second years of the reign of his late majesty King William the

Application
of Purchase-
money for
Lands sold
in Scotland.

4 & 5 Vict.
c. 38.

Fourth, intituled 'An Act for amending and making more effectual the Laws concerning Turnpike Roads in Scotland.'

[4. *Conveyance of Estates in Schools, to whom and how.*

Estates now
vested in
Trustees for
the Purposes
of Education
may be con-
veyed to the
Minister and
Church-
wardens.

[Sect. 8. "And whereas schools for the education of the poor in the principles of the Established Church, or in religious and useful knowledge, and residences for the masters or mistresses of such schools, have been heretofore erected, and are vested in trustees not having a corporate character; be it therefore enacted, That it shall be lawful for the trustees for the time being of such last-mentioned schools and residences, not being subject to the provisions of the act passed in the last session of parliament, intituled 'An Act for improving the Conditions and extending the Benefits of Grammar Schools,' to convey or assign the same, and all their estate and interest therein, to such ministers and churchwardens and overseers of the poor of the parish within which the same are respectively situate, and their successors as aforesaid, or, being situate within the ecclesiastical district not being a parish as hereinafter defined, then to the minister and church or chapelwardens of the church or chapel of such district, and their successors, in whom the same shall thereafter remain vested accordingly, but subject to and under the existing trusts and provisions respectively affecting the same."

All Convey-
ances of
Land under
6 & 7 W. 4,
c. 70, to be
deemed ef-
fectual for
vesting the
Fee Simple.

[Sect. 15. "And whereas in many cases conveyances of land have been made, purporting to be made in pursuance of the powers of the said first recited act, to the minister or incumbent and the churchwardens or chapelwardens of certain parishes or places, as and for sites of schools or houses of residence for the schoolmasters; and doubts have been entertained whether such conveyances are valid and effectual for the purposes of conveying the fee simple, in consequence of the said statute not containing any words of limitation to the successors of such persons; be it therefore enacted, That all conveyances whereby any land shall have been conveyed to the minister or incumbent and the churchwardens or chapelwardens of any parish or place for the time being, whether made to them as such minister or incumbent and churchwardens or chapelwardens, or to them and their successors, shall be deemed and taken to have been and shall be valid and effectual for the purpose of vesting the fee simple, or such other estate as hath been proposed to be conveyed, in the persons who from time to time shall be the minister or incumbent and the churchwardens or chapelwardens of such place, such minister being the rector, vicar, or perpetual curate, whether endowed or not, of the said parish or place."

Certain Con-
veyances of
Lands, &c.
for Purposes
of Education
not enrolled
as required
by the 9 G. 2,
c. 36, ren-
dered valid
if enrolled
within 12

[Sect. 16. "And whereas certain lands or buildings have been conveyed for valuable consideration, upon trust for the purposes of the education of the poor, and through inadvertence or other causes the deeds or assurances conveying the same have not been enrolled in chancery as required by the act passed in the ninth year of the reign of his late majesty King George the Second, intituled 'An Act to restrain the Disposition of Lands whereby the same become unalienable,' and by the said hereinbefore first recited act; be it there-

fore enacted, That notwithstanding the said provisions all such conveyances shall be and remain valid for the space of twelve calendar months next ensuing the passing of this act, and if enrolled in chancery before the expiration of that time shall be and remain valid hereafter as if duly enrolled within the time required by the provisions of the said acts: Provided nevertheless, that no effect shall be given hereby to any deed or other assurance heretofore made, so far as the same has been already avoided by any suit at law or in equity, or by any other legal or equitable means whatsoever, or to affect or prejudice any suit at law or in equity actually commenced for avoiding any such deed or other assurance, or for defeating the charitable uses in trust or for the benefit of which such deed or other assurance may have been made."

4 & 5 Vict.
c. 38.

Months from
the passing
of this Act.

Proviso for
Deeds avoid-
ed in any
Suit.

[5. *Other Provisions of the Act.*

[By section 17, no schoolmaster is to acquire a life interest by virtue of his appointment.

[By section 18, justices of the peace or sheriffs are to give possession of school-rooms, &c. in case of the refusal of the master.

[Sect. 20. "That the term 'parish' in this act shall be taken to signify every place separately maintaining its own poor, and having its own overseers of the poor and church or chapelwardens.

Definition of
the Term
"Parish."

[Sect. 21. "That this act shall not extend to Ireland.

Act not to
extend to
Ireland.

[Sect. 22. "That nothing herein contained shall repeal or affect an act passed in the second year of the reign of her present Majesty, intituled 'An Act to facilitate the Foundation and Endowment of additional Schools in Scotland,' or another act passed in the last session of parliament, intituled 'An Act to enable Proprietors of Entailed Estates in Scotland to feu or lease on long Leases Portions of the same for the building of Churches and Schools, and for Dwelling Houses and Gardens for the Ministers and Masters thereof.'"

Act not to
affect 1 & 2
Vict. c. 87,
or 3 & 4 Vict.
c. 48.

[VI. *Free Grammar Schools, Discipline of, before 3 & 4 Vict. c. 77.*

[A charity-school is not within ecclesiastical cognizance (n)
—ED.]

By the 43 Eliz. c. 4, where lands, rents, annuities, goods or money, given for maintenance of free schools or schools of learning, have been misapplied, and there are no special visitors or governors appointed by the founder, the lord chancellor may award commissions under the great seal, to inquire and take order therein.

Subject to a
Commission
of pious Uses,
where there is
no Visitor.

Whether a mandamus lieth for restoring a schoolmaster or usher, when in fact they have been deprived by the local visitors, is doubtfully spoken of in the books of common law; and the pleadings upon them seem not to touch the present

Whether the
Visitor's
power is con-
clusive.

(n) [Rector of St. George's, Hanover Square, v. Steuart, Stra. 1126.]

point, but to turn chiefly upon this, whether they are to be accounted offices of a public or private nature (o).

Mandamus
to restore to
Under-
mastership.

Thus in the case of *The King v. The Bailiffs of Morpeth*, a mandamus was granted to restore a man to the office of under-schoolmaster of a grammar school at Morpeth, founded by King Edward VI., the same being of a public nature, being derived from the crown (p).

When Gram-
mar Schools
are subject
to Queen's
Courts.
When not.

And the distinction seemeth to be this: If they shall be deemed of a public nature, as constituted for public government, they shall be subject to the jurisdiction of the king's courts of common law; but if they be judged matters only of private charity, then they are subject to the rules and statutes which the founder ordains, and to the visitor whom he appoints, and to no other (q).

Colleges.

In the case of colleges in the universities, whether founded by the king or by any other, it seemeth now to be settled, that they are to be considered as private establishments, subject only to the founder, and to the visitor whom he appointeth; and it doth not seem easy to discern any difference between schools and colleges in this respect (r).

Appointment
of Master of
a Grammar-
School.

[The master of a free school of a royal foundation may be elected on an information in the attorney-general's name (s). A power to appoint a schoolmaster to an ancient foundation given to the vicar and churchwardens (of whom there were eleven), and in case of their neglect to appoint, then to devolve to two corporate bodies in succession, and to result in the *dernier resort* to the same vicar and churchwardens, to whom also the general power of managing the trust was committed, was held to be well executed by the vicar and a majority of the churchwardens, especially if such an election be supported by usage (t). On the general principle that a visitor cannot be judge in his own cause, or visit himself, unless that power be expressly conferred on him, it has been held, that where by a deed founding a school, a power was given to the lord of the manor of the parish of assisting in the nomination and removal of the head master, and of controlling him in various respects, the appointment of the lord of the manor himself to that situation is inconsistent with the provision of the deed; and the lord chancellor (u) on petition (under 52 Geo. 3, c. 101) declared that such an appointment was inconsistent with the due administration of the trusts of the charity, and that the master should be

(o) Gibs. 1110.

(p) Str. 58.

(q) *Philips v. Bury*, Ld. Raym. 5.

(r) [For the general power and jurisdiction of a Visitor, see titles **Colleges [and Universities], Deans and Chapters, Hospitals, and Visitation.**—ED.]

(s) [*Attorney-General v. Town of*

Shrewsbury, Bunb. 215.]

(t) [*Withnell v. Gartham*, 6 T.R. 388; *Wilkinson v. Malin*, per Lord Lyndhurst, C. B., 2 Crompt. & Jervis, 636; S. C. 2 Tyrw. 544; *Rex v. Beerton*, 3 T.R. 592.]

(u) [Judgment delivered in *Re Risley School*, 1st June, 1830.]

removed, and another appointed in the manner prescribed by the deed of foundation. Where the master of a free school has been appointed by the persons acting as trustees, and has acted as such for many years, the validity of his appointment will not be allowed to be questioned if he has duly executed the duties of his office (*x*). Nor is there any incompatibility in the office of master of a free grammar school and of vicar of the parish. The master of such a school may take boarders to be educated in the school, but not so as to prejudice the scholars. But where the original statutes show that the intention of the founder was, that the master should be employed personally in teaching the children, he must not leave the detailed management of the school to an usher; nor is it any excuse for doing so, that, as the minister of a chapel annexed to the school, he devoted his time to ecclesiastical duties (*y*).

His Power
and Duty.

[A schoolmaster elected by a majority of the trustees of a public charity at a meeting of the body, cannot be dismissed except at a similar meeting (*z*). The visitors and feoffees of a free grammar-school, who have dismissed the schoolmaster for misconduct, cannot maintain an action of ejectment for recovery of the possession of the school-house till they have determined the master's interest therein, upon summons in the ordinary manner, when he may be heard in answer to the charges forming the ground of such dismissal (*a*). But in ejectment against a schoolmaster, who has been removed by the sentence of the trustees of the school for misbehaviour, it is not necessary for the lessors of the plaintiff to prove the grounds of the sentence, nor can the defendant disprove them (*b*). It seems to have been held, that neglecting the scholars would be a good ground for removing the schoolmaster (*c*).

Dismissal of
Schoolmaster.

[In the case of a grammar school founded and endowed by virtue of letters patent, which ordained that the school should be altogether of the patronage and disposition of the founder and heirs, by whom the schoolmasters and guardians should be nominated for ever, it has been held that such right of nomination may lawfully be aliened (*d*).—ED.]

Right to
nominate a
Schoolmaster
may be alien-
ed.

H., 1725, *Eden v. Foster* (*e*). The free grammar-school of Birmingham was founded by King Edward VI., who endowed the said school, and by his letters patent appointed perpetual

Governors *eo nomine* are
not Visitors.

(*x*) [*Attorney-General v. Hartley*, 2 J. & W. 353, 376.]

(*y*) [*Attorney-General v. Hartley*, 2 J. & W. 353; *Attorney-General v. Earl of Mansfield*, 2 Russ. 501; and see the recent judgment of Lord Cottenham in the case of the *Manchester Grammar School*, *post*.—ED.]

(*z*) [*Wilkinson v. Malin*, 2 Tyrw. 544; 2 C. & J. 636.]

(*a*) [*Doe d. Earl of Thanet v. Gartham*, 8 Moore, 368; 1 Bing. 357; *Rex v. Gaskin*, 8 T. R. 109.]

(*b*) [*Doe d. Davy v. Haddon*, 3 Doug. 310.]

(*c*) [*Doe d. Coyle v. Cole*, 6 C. & P. 359.]

(*d*) [*Attorney-General v. Brentwood School*, 3 B. & Ad. 59.]

(*e*) 2 P. Wms. 325.

Governors *eo nomine* are not Visitors.

governors thereof, who were thereby enabled to make laws and ordinances for the better government of the said school, but by the letters patent no express visitor was appointed, and the legal estate of the endowment was vested in these governors. After a commission had issued under the great seal to inspect the management of the governors, and all the exceptions being already heard and overruled, it was now objected to this commission, that the king having appointed governors, had by implication made them visitors likewise; the consequence of which was, that the crown could not issue a commission to visit or inspect the conduct of these governors. The matter first came on before Lord Chancellor Macclesfield, and afterwards before Lord King, who desired the assistance of Lord Chief Justice Eyre and Lord Chief Baron Gilbert; and accordingly the opinion of the court was now delivered *seriatim*, that the commission was good. 1. It was laid down as a rule, that where the king is founder, in that case his majesty and his successors are visitors; but where a private person is founder, there such private person and his heirs are by implication of law visitors. 2. That though this visitatorial power did result to the founder and his heirs, yet the founder might vest or substitute such visitatorial right in any other person or his heirs. 3. They conceived it to be unreasonable, that where governors are appointed, these by construction of law and without any more should be visitors, should have an absolute power, and remain exempt from being visited themselves. And therefore, 4. That in those cases where the governors or visitors are said not to be accountable, it must be intended, where such governors have the power of government only, and not where they have the legal estate, and are entrusted with the receipt of the rents and profits (as in the present case); for it would be of the most pernicious consequence, that any persons entrusted with the receipt of rents and profits, and especially for a charity, though they misemploy never so much these rents and profits, should yet not be accountable for their receipts: this would be such a privilege as might of itself be a temptation to a breach of trust. 5. That the word governor did not itself imply visitor; and to make such a construction of a word, against the common and natural meaning of it, and when such a strained construction could not be for the benefit, but rather to the great prejudice of the charity, would be very unreasonable; besides, it would be making the king's charter operate to a double intent, which ought not to be. And the commission under the great seal was resolved to be well issued.

Whether the Trust surviveth, on the Feoffees dying away beyond the limited Number.

The following case relateth particularly to a church,* but is equally applicable to, and far more frequently happeneth in, the case of schools. It is that of *Waltham Church*, H., 1716. Edward Denny, Earl of Norwich, being seised by grant from

King Edward VI., of the scite and demesnes of the dissolved monastery of Waltham Holy Cross, and of the manor of Waltham, and of the patronage of the church of Waltham, and of the right of nominating a minister to officiate in the said church, it being a donative, the abbey being of royal foundation, by his will in 1636, amongst other things the said earl devised a house in Waltham, and a rent-charge of 1000*l.* a year, and ten loads of wood to be annually taken out of the forest of Waltham, and his right of nominating a minister to officiate in the said church, to six trustees and their heirs, of which Sir Robert Atkins was one, in trust for the perpetual maintenance of the minister, to be from time to time nominated by the trustees; and directed that when the trustees were reduced to the number of three, they should choose others. It so fell out that all the trustees, except Sir Robert Atkins, were dead; and he alone took upon him to enfeoff others to fill up the number; and now the surviving trustees (of the said Sir Robert's appointment) did nominate Lapthorn to officiate; and the Lady Floyer and Campion, who were owners of the dissolved monastery and of the manor, claimed the right of nomination to the donative, and had nominated Cowper to officiate there, and he was got into possession. The bill was, that Lapthorn might be admitted to officiate there, to be quieted in the possession, and to have an account of the profits. By the defendants it was, amongst other things, insisted, that the trustees, having neglected to convey over to others, when they were reduced to the number of three, and the legal estate coming only to one single trustee, he had not power to elect others; but by that means the right of nomination resulted back to the grantor, and belonged to the defendants, who had the estate, and stood in his place; or at least the court ought to appoint such trustees as should be thought proper. By Cowper, Lord Chancellor: It is only directory to the trustees, that when reduced to three, they should fill up the number of trustees; and therefore, although they neglected so to do, that would not extinguish or determine their right; and Sir Robert Atkins, the only surviving trustee, had a better right than any one else could pretend to, and might well convey over to other trustees; it was but what he ought to have done: and it was decreed for the plaintiff with costs, and an account of profits; but the master to allow a reasonable salary to Cowper whilst he officiated there (*f*).

[By 52 Geo. 3, c. 101, commonly called Sir S. Romilly's Act, entitled "An Act to provide a summary Remedy in Cases of Abuses of Trusts created for Charitable Purposes," it is enacted—

Sir S. Romilly's Act.

["That in every case of a breach of any trust or supposed breach of any trust created for charitable purposes, or whenever the direc-

52 Geo. 3, c. 101.

(*f*) 2 Vern. 749.

52 Geo. 3,
c. 101.

In Cases of
Breach of
Trust, Peti-
tion presented
to Chancellor,
&c. who shall
hear the same
in a summary
way, and
make Order
therein.

Appeal to
House of
Lords.

Petitions
signed and
certified, &c.

Lord Cotten-
ham's Judg-
ment in the
Case of the
*Manchester
Grammar
School*.

tion or order of a court of equity shall be deemed necessary for the administration of any trust for charitable purposes, it shall be lawful for any two or more persons to present a petition to the lord chancellor, lord keeper or lords commissioners for the custody of the great seal, or master of the rolls for the time being, or to the Court of Exchequer, stating such complaint, and praying such relief as the nature of the case may require; and it shall be lawful for the lord chancellor, lord keeper and commissioners for the custody of the great seal, and for the master of the rolls, and the Court of Exchequer, and they are hereby required, to hear such petition in a summary way, and upon affidavits or such other evidence as shall be produced upon such hearing to determine the same, and to make such order therein, and with respect to the costs of such applications as to him or them shall seem just; and such order shall be final and conclusive, unless the party or parties who shall think himself or themselves aggrieved thereby shall, within two years from the time when such order shall have been passed and entered by the proper officer, have preferred an appeal from such decision to the House of Lords, to whom it is hereby enacted and declared that an appeal shall lie from such order."

[Sect. 2. "Provided always, that every petition so to be preferred as aforesaid shall be signed by the persons preferring the same, in the presence of and shall be attested by the solicitor or attorney concerned for such petitioners, and every such petition shall be submitted to and be allowed by his majesty's attorney or solicitor general, and such allowance shall be certified by him before any such petition shall be presented."

[The recent case of *The Free Grammar School of Manchester* (g), decided on the 2nd of December, 1839, by Lord Cottenham, contains perhaps the most important precedent that has hitherto been furnished as to the operation of the foregoing act upon this class of charitable institutions, and it is also valuable as illustrating several of the questions which have been discussed in the course of this chapter.

[The Lord Chancellor.—"I consider this case (h) as one of the very highest importance; as much from its peculiar circumstances, as from its connexion with the education of the children of the inhabitants of the populous and important town of Manchester. *An act* (i) *was passed during the last session of parliament to extend the powers of the Court of Chancery with respect to grammar schools*, from which act I find the school of

(g) [*Attorney-General v. Earl of Stamford*, Jurist, 1105.]

(h) [The following cases were cited: *Ludlow Corporation v. Greenhouse*, 1 Bligh. N. S. 17; *Bedford Charity*, 2 Swanst. 470; *Attorney-General v. Earl of Clarendon*, 17 Ves. 491; *Attorney-General v. Whiteley*, 11 Ves. 241; *Attorney-General v. Earl of Mansfield*, 2 Russ. 501; *Attorney-*

General v. Haberdashers' Company, 3 Russ. 530; *Attorney-General v. Dixie*, id. 534; *Attorney-General v. Hartley*, 2 J. & W. 353; *Attorney-General v. Skinners' Company*, Jac. 629; *Attorney-General v. Christchurch*, Jac. 474; *Attorney-General v. Coopers' Company*, 19 Ves. 196.]

(i) [See *infra*.]

Manchester was specially excepted; but there are fortunately some circumstances and peculiarities in the case of this school which relieve the court from any difficulty that might otherwise be experienced in dealing with it. There is sufficient in this case to relieve it from the operation of those cases in which the court has, I think, unnecessarily restricted the meaning of the term grammar school. *There is no doubt that the school was by the statutes intended to be strictly a grammar school, but later cases have departed from the strictness of the doctrine of cy près, and relieved the court from considering the matter within those narrow limits which that circumstance would seem to require.* Indeed, without that, the statute of 16 Hen. VIII. points out the course to be adopted with respect to this school. By that statute it is provided, that the school should be founded 'for the teaching of all infants and others that shall come to the school, their A, B, C, primer, and sorts, until they be in grammar.' The statute goes on most wisely to provide in these terms:—'Because in time to come things may and shall survive and grow by sundry occasions and causes, which, at the making of the acts and ordinances, it may not be possible to come to mind, the feoffees are therefore authorized, from time to time, when need shall require, to call in to their aid counsel learned in the law, and men of good repute, to have full power and authority to augment, increase, expend, and perform all such acts and ordinances, articles, compositions, and agreements, concerning the schoolmaster, ushers, and scholars, for their and every of their offices in connexion with the free school.' The power given by this statute to the court it will exercise for the benefit of the testator's property. The bill of the relators asks for an account, the removal of the trustees, and a new scheme for the administration of the charity. Now I am clearly of opinion that the relators have not made out any case for an account. The statute prescribes the mode in which the receiver is to keep his accounts; and no errors have been proved in the accounts of the person entrusted with the management of the revenues of the charity; and in the absence of all such proof, to decree an account would be an unnecessary waste of the funds of the charity, and would expose every charity in the kingdom to a suit for an account. As to the second point, the removal of the trustees, I am also of opinion, that the court cannot make any decree. It is true that, by the statutes, the feoffees are to be chosen of the most honest gentlemen and persons resident in the parish of Manchester; but for a very considerable period that rule has been departed from, by nominating as trustees persons of the neighbourhood, distinguished by their rank, property, and intelligence, to whom the charity is undoubtedly much indebted for the zeal and assiduity they have displayed in the management of its affairs; and to remove

Case of the
Manchester
Grammar
School.

Statute of
16 Hen. 8,
affecting
Manchester
School.

Removal of
Trustees.

Case of the
Manchester
Grammar
School.

Intent of Sir
S. Romilly's
Act.

them would be to do an injury to the charity (j). *Although, however, the court cannot, in the absence of all proof of misconduct on the part of these trustees, comply with a prayer for their removal; it is a very different question when the court comes to pronounce an opinion as to what is to be done for the future.* The statutes prescribe that the trustees are to be resident; and whatever difficulty may have occurred in selecting fit persons at first, no such difficulty can occur now in selecting from the populous parish of Manchester a sufficient number of persons competent to fill the situation of trustees. It is desirable at all times to adhere as much as possible to the provisions of the statutes; and of the two classes of persons, those who are resident in the parish seem to be the most eligible for the discharge of the duties of trustees, when vacancies occur for their appointment. The most important question, that of the scheme of 1833, is all that remains now to be considered. The first difficulty occurs in the assertion of the defendants, that that scheme is conclusive, and cannot be disturbed; while the relators declare it to have been altogether *ex parte*, and therefore ought to go for nothing; and they call upon the court to disregard it. I cannot wholly concur in either of these propositions. That the decree was taken *ex parte* there can be no doubt. The attorney-general, it is admitted on all hands, was no party to the proceedings in the master's office; and *it was the opinion of Sir John Leach, that the attorney-general ought at all times to be a party in such cases; and I trust that no proceeding of the same description, or where charity property is to be administered, will ever take place without the attorney-general being a party, unless it be intended to convert Sir Samuel Romilly's Act, under which such proceedings take place, from a great public benefit into a serious mischief.* And if I find that any practice prevails in the master's office of sanctioning schemes without the presence of the attorney-general, it will be necessary for the court to make a general order on the subject, for the purpose of correcting such an abuse. But although the scheme was drawn up without the attorney-general, and I am clearly of opinion that such a proceeding cannot be conclusive against a well-founded complaint, that is no bar to the adoption by the court of such parts of that scheme as it may consider proper; for although many parts of it are objectionable, there are other parts of which I fully approve. I propose, therefore, to intimate what parts he should correct or adopt, and then send it back to the master with such intimation of the opinion of the court, in order to enable the attorney-general to bring forward such suggestions as he may think proper. Of those parts of the scheme which are objectionable, I particularly refer to that which makes extensive

(j) [*Attorney-General v. Earl of Clarendon*, 17 Ves. 499.]

provision, out of the funds of the charity, for the reception of boarders by the head and other masters of the school. *Undoubtedly the court, in many cases, and for weighty reasons, had sanctioned the practice of masters taking boarders; but the principle on which the court has acted in allowing this, has been a regard to the interests of the charity, on conviction that the purposes of the charity would not be prejudiced by it, and in some cases that they would be advanced; as where, from the smallness of the income arising from the charity property, it might be desirable to augment the salary of the master by such means, with a view to providing a more efficient master for the school. These cases have no application to the present, where the funds of the charity are so ample; and it is quite impossible to justify, on any principle, that part of the scheme of 1833, by which 10,000*l.* has been expended in building houses for the masters out of the charity funds. The case in 17 Ves. is an authority for the system of taking boarders; but the circumstances of that case were special; and I confess that, looking at what was done in *The Attorney-General v. Coopers' Company*(*k*), and looking also at the principle laid down by Lord Eldon in that case, I am very much at a loss to reconcile it with what was done by him in other cases; and I cannot tell how Lord Eldon could get over these considerations. The money, however, in the present case, has unfortunately been spent in erecting these buildings; and although the court would not sanction such an expenditure if called on now to do so, it must have regard to the fact, that the system of taking boarders took place from a very early period after the foundation of the school, and that the masters have accepted their situations with the understanding that such practice was to continue. It is not expedient to disappoint these expectations; but, at the same time, the court must protect the funds of the charity from such abuses for the future. *That part of the scheme, therefore, which gives the boarders of the masters a share of the exhibitions and other advantages intended solely for the scholars on the foundation, must be altered, for they are clearly not entitled to participate in them.* The result of this portion of the scheme has been what might have been expected. Looking at the statements furnished me on that matter, I find that from 1807 to 1836 there were fifty-seven exhibitions given to boarders, and only twenty-eight to day-scholars. I impute no partiality to any one in the distribution of them; but the superior degree of attention which the boarders naturally receive in their instruction leaves the day-scholars little or no chance in the competition for such advantages. The impropriety of such a course is indeed so obvious, that I propose to make that part of the scheme the subject of a declaration in the*

Case of the
Manchester
Grammar
School.

Where the
Court has al-
lowed the
Master to
take Boarders.

(*k*) [19 Ves.]

Case of the
Manchester
Grammar
School.

decree, and to declare that no exhibitions in future are to be given to those who are or have been boarders, although the payments are to be continued to those who may already have received them. There are however other parts of the scheme, such as the increase of the income of the masters, and the exclusion of scholars under six years of age, which are inconsistent with the statutes, and which will properly come under the consideration of the master in reviewing the scheme. This is the more necessary, as I perceive that, although the masters receive among them an annual income of more than 2000*l.* a year, and the charity has a large surplus fund, no addition has been made to the exhibitions. Of the system of teaching introduced in 1833 I approve. Under these circumstances, I propose to send the matter to the master, to revise the scheme of 1833 in such manner as will be found most likely to promote a general system of education, which will give all the children of the inhabitants of Manchester the benefits of instruction in all branches of learning; with liberty to the attorney-general to offer such suggestions as may appear to be conducive to that object, regard being had to the opinion of the court on the subject of the boarders, the admission of children of tender years, of whom all who are capable of instruction should be admitted, the emoluments of the masters, and such regulations as may be requisite to comply with the provisions of the statutes, and provide an efficient system of education for the children of the inhabitants of Manchester."

[By 59 Geo. 3, c. 91, s. 5, it is enacted—

59 Geo. 3,
c. 91.

Where Regulations of Charity are insufficient for a due Administration of the Funds, Trustees may apply by Petition to Chancery or Exchequer sitting in Equity for Relief.

Limitation of Appeal.

["That whenever it shall appear to the trustees of any free school, hospital or other charitable institution or donation within the provisions of this act, that the statutes or regulations thereof are insufficient for the secure and due administration of the funds thereto belonging, it shall be lawful for such numbers of them as are by the said statutes or regulations empowered to do any act, by and with the consent of any five or more of the said commissioners, to present a petition to the lord chancellor, lord keeper or lords commissioners of the great seal, or to the Court of Exchequer sitting as a court of equity, praying such relief as the nature of the case may require; and the lord chancellor, lord keeper and lords commissioners of the great seal, and the said Court of Exchequer, are hereby authorized and empowered to give such directions, and to make such order touching the matter of the said application, as to them respectively shall seem fit; which order shall be final and conclusive to all intents and purposes whatsoever, unless the party or parties who shall think himself or themselves aggrieved thereby shall, within two years after the time when such order shall have been made and entered by the proper officer, prefer an appeal from such order to the House of Lords, to whom it is hereby enacted and declared that an appeal shall lie from such order."



3 & 4 Vict.
c. 77.

[VII. *Discipline of Grammar Schools since 3 & 4 Vict. c. 77.*

[Sect. 13. "And whereas it is expedient that the discipline of grammar schools should be more fully enforced: be it declared and enacted, That in all cases in which sufficient powers, to be exercised by way of visitation or otherwise in respect of the discipline of such schools, shall already exist and be vested in any person or persons, it shall be lawful for such person or persons to exercise the same when and so often as they shall deem fit, either by themselves personally or by commission, without being first requested or required so to do, and likewise to direct such returns to be made by the masters of such schools, of the state thereof, of the books used therein, and of such other particulars as he or they may think proper, and also to order such examinations to be held into the proficiency of the scholars attending the same as to him or them may seem expedient."

Where sufficient Powers of Discipline exist, the Persons possessing to be at liberty to exercise them.

[Sect. 14. "That in all cases in which any person or persons having authority, by way of visitation or otherwise, in respect of the discipline of any grammar school, may not have sufficient power properly to enforce the same, it shall be lawful for the Court of Chancery to order and direct that the powers of such person or persons shall be enlarged to such extent and in such manner, and subject to such provisions, as to the said court shall seem fit."

Where such Powers not sufficient, Court may enlarge them.

[Sect. 15. "That in all cases in which no authority to be exercised by way of visitation in respect of the discipline of any grammar school is now vested in any known person or persons, it shall be lawful for the bishop of the diocese wherein the same is locally situated to apply to the Court of Chancery, stating the same; and the said court shall have power, if it so think fit, to order that the said bishop shall be at liberty to visit and regulate the said school in respect of the discipline thereof, but not further or otherwise."

Where no such Powers, Court may create them.

[Sect. 16. "That in event of the person or persons by whom powers of visitation in respect of the discipline of any grammar school ought to be exercised refusing or neglecting so to do within a reasonable time after the same ought to be exercised, or in the event of its being uncertain in whom the right to exercise such powers is vested, such powers shall be exercised *pro hac vice* by some person specially appointed by the authority of the Court of Chancery, on application made by any person or persons interested in such grammar school: Provided always, that nothing herein contained shall exempt any visitor from being compelled by any process to which he is now amenable to perform any act which he is now compellable to perform."

Court of Chancery may substitute a Person to act *pro hac vice* in certain Cases.

Proviso.

[Sect. 17. "And whereas it is expedient to provide for the more easy removal of unfit and improper masters; be it declared and enacted, That it shall be lawful for the Court of Chancery to empower the person or persons having powers of visitation in respect of the discipline of any grammar school, or who shall be specially appointed to exercise the same under this act, and the governors, or either of them, after such inquiries, and by such mode of proceeding as the court shall direct, to remove any master of any grammar school who has been negligent in the discharge of his

Court of Chancery to have Power to appoint Mode of removing Masters.

3 & 4 Vict.
c. 77.
*Discipline
of Grammar
Schools.*

Power in
certain Cases
to assign re-
tiring Pen-
sion.

Premises
held over by
Masters dis-
missed, or
ceasing to
hold Office,
to be re-
covered in a
summary
Way.

1 & 2 Vict.
c. 74.

Master shall
not set up
Title, &c.

duties, or who is unfit or incompetent to discharge them properly and efficiently, either from immoral conduct, incapacity, age, or from any other infirmity or cause whatsoever."

[Sect. 18. " Provided always, that in case the cause for which any master be removed shall be incompetency from age or other infirmity, it shall be lawful for the said governors, with the approbation of the visitor, to assign to the use of such master any portion of the annual revenues of the said grammar school in one or more donations, or by way of annuity determinable on the death of such master, or on any other specified event during his life, or to assign to him any part of the estate of the said grammar school for his occupation for a term determinable in like manner; provided that there shall remain sufficient means to provide for the efficient performance of the duties which belong to the office from which such master shall be removed."

[Sect. 19. " And for the more speedy and effectual recovery of the possession of any premises belonging to any grammar school which the master who shall have been dismissed as aforesaid, or any person who shall have ceased to be master, shall hold over after his dismissal or ceasing to be master, except under such assignment as may have been made under the provisions of this act, the term of such assignment being still unexpired, and the premises assigned being in the actual occupation of the master so dismissed or ceased to be master, be it enacted, That when and as often as any master holding any schoolroom, schoolhouse, or any other house, land, or tenement, by virtue of his office, or as tenant or otherwise under the trustees of the said grammar school, except on lease for a term of years still unexpired, shall have been dismissed as aforesaid, or shall have ceased to be master, and such master, or (if he shall not actually occupy the premises or shall only occupy a part thereof) any person by whom the same or any part thereof shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, except such as are hereinbefore excepted, within the space of three months after such dismissal, or ceasing to be master, it shall be lawful for justices of the peace acting for the district or division in which such premises or any part thereof are situated, in petty sessions assembled, or any two of them, and they are hereby required, on the complaint of the said trustees or their agents, and on the production of an order of the Court of Chancery declaring such master to have been duly dismissed or to have ceased to be master, to issue a warrant, under their hands and seals, to the constables and peace officers of the said district or division, commanding them, within a period to be therein named, not less than ten nor more than twenty-one clear days from the date of such warrant, to enter into the premises, and give possession of the same to the said trustees or their agents, in such manner as any justices of the peace are empowered to give possession of any premises to any landlord or his agent under an act passed in the session of parliament held in the first and second years of the reign of her present Majesty, intituled 'An Act to facilitate the Recovery of Possession of Tenements after due Determination of the Tenancy.'"

[Sect. 20. " Provided always, that nothing in this act or the said recited act shall extend or be construed to extend to enable any

master so dismissed, or ceasing to be master as aforesaid, to call in question the validity of such dismissal, provided that the same shall have proceeded from the persons authorized to order the same, after such inquiries and by such mode of proceeding as required in that behalf, or to call in question the title of the trustees to possession of any premises of which such master shall have become possessed by virtue of his late office, or as tenant or otherwise under the trustees of the said grammar school for the time being."

3 & 4 Vict.
c. 77.
*Discipline
of Grammar
Schools.*

[Sect. 21. "And whereas it is expedient to facilitate applications to the Court of Chancery under this act; be it enacted, That all applications may be heard and determined and all powers given by this act to the Court of Chancery may be exercised in cases brought before such court by petition only, such petitions to be presented, heard, and determined according to the provisions of an act passed in the fifty-second year of the reign of his late majesty King George the Third, intituled 'An Act to provide a summary Remedy in Cases of Abuses of Trusts created for charitable Purposes.'"]

Applications
to Court to
be by Peti-
tion.

Such Pe-
titions to be
decided
under 52 G. 3,
c. 101.

[Sect. 22. "That in every case in which the patronage of any grammar school, or right of appointing the schoolmaster or under master thereof, is vested in the crown, the lord high chancellor, or the chancellor of the duchy of Lancaster in respect of any grammar school within the county palatine of Lancaster, shall be considered as the patron of such grammar school for the purposes of this Act."

If Crown is
Patron, Lord
High Chan-
cellor or
Chancellor of
Duchy of
Lancaster
shall act,

[Sect. 23. "That the powers and authorities hereinbefore given to the lord high chancellor shall and may be exercised in like manner by and are hereby given to the lord keeper or lords commissioners for the custody of the great seal respectively for the time being."

Powers of
Lord Chan-
cellor to be
exercised by
Lord Keeper,
&c.

[Sect. 24. "Provided always, that neither this act nor any thing therein contained shall be any way prejudicial or hurtful to the jurisdiction or power of the ordinary, but that he may lawfully execute and perform the same as heretofore he might according to the statutes, common law, and canons of this realm, and also as far as he may be further empowered by this act; and that this act shall not be construed as extending to any of the following institutions; (that is to say,) to the universities of Oxford or Cambridge, or to any college or hall within the same, or to the university of London, or any colleges connected therewith, or to the university of Durham, or to the colleges of Saint David's or Saint Bee's, or the grammar schools of Westminster, Eton, Winchester, Harrow, Charter House, Rugby, Merchant Tailors, Saint Paul's, Christ's Hospital, Birmingham, Manchester, or Macclesfield, or Louth, or such schools as form part of any cathedral or collegiate church."

Saving of
Rights of
Ordinary.

Certain
Foundations
exempted
from this
Act.

[Sect. 25. "That in the construction and for the purposes of this act, unless there be something in the subject or context repugnant to such construction, the word 'grammar school' shall mean and include all endowed schools, whether of royal or other foundation, founded, endowed, or maintained for the purpose of teaching Latin and Greek, or either of such languages, whether in the instrument of foundation or endowment, or in the statutes or decree of any court of record, or in any act of parliament establishing such school, or in any other evidences or documents, such

Construction
of Terms.

3 & 4 Vict.
c. 77.
*Discipline
of Grammar
Schools.*

instruction shall be expressly described, or shall be described by the word 'grammar' or any other form of expression which is or may be construed as intending Greek or Latin, and whether by such evidences or documents as aforesaid, or in practice, such instruction be limited exclusively to Greek or Latin, or extended to both such languages, or to any other branch or branches of literature or science in addition to them or either of them; and that the words 'grammar school' shall not include schools not endowed, but shall mean and include all endowed schools which may be grammar schools by reputation, and all other charitable institutions and trusts, so far as the same may be for the purpose of providing such instruction as aforesaid; that the word 'visitor' shall mean and include any person or persons in whom shall be vested solely or jointly the whole or such portion of the visitatorial power as regards the subject of the enactment or provision, or any powers in regard to the discipline or making of new statutes in any school; that the word 'governors' shall mean and include all persons or corporations, whether sole or aggregate, by whatever name they be styled, who may respectively have the government, management, or conduct of any grammar school, whether they have also any control over the revenues of the school as trustees or not; that the word 'trustees' shall mean and include all persons and corporations, sole or aggregate, by whatever name they may be styled, who shall have the management, disposal, and control over the revenues of any grammar school, whether the property be actually vested in them or not; that the word 'statutes' shall mean and include all written rules and regulations by which the school, schoolmasters, or scholars are, shall, or ought to be governed, whether such rules or regulations are comprised in, incorporated with, or authorized by any royal or other charter, or other instrument of foundation, endowment, or benefaction, or declared or confirmed by act of parliament, or by decree of any court of record, and also all rules and regulations which shall be unwritten, and established only by usage or reputation; that the word 'schoolmaster' shall mean and include the head master only, and the word 'under master' every master, usher, or assistant in any school except the head master; and that the word 'master' shall mean and include as well any head master as under master; that the words 'discipline' or 'management' of a school shall mean and include all matters respecting the conduct of the masters or scholars, the method and times of teaching, the examination into the proficiency of the scholars of any school, and the ordering of returns or reports with reference to such particulars, or any of them; and that any word importing the singular number only shall mean and include several persons or things as well as one person or thing, and the converse."

Act may be
amended this
Session.

[Sect. 26. "That this act may be amended or repealed by any act to be passed in this present session of parliament."—ED.]

VIII. *Taxes.*

By the 43 Eliz. c. 2, all lands within the parish are to be assessed to the *poor* rate.

But by the annual acts for the *land tax*, it is provided, that the same shall not extend to charge any masters or ushers of any schools, for or in respect of any stipend, wages, rents, or profits, arising or growing due to them, in respect of their said places or employments.

Provided, that nothing herein shall extend to discharge any tenant of any of the houses or lands belonging to the said schools, who by their leases or other contracts are obliged to pay all rates, taxes, and impositions whatsoever; but that they shall be rated and pay all such rates, taxes and impositions.

And in general, it is provided, that all such lands, revenues, or rents, settled to any charitable or pious use, as were assessed in the fourth year of William & Mary, shall be liable to be charged; and that no other lands, tenements, or hereditaments, revenues, or rents whatsoever, then settled to any charitable or pious uses, as aforesaid, shall be charged.

And the reason of this distinction seemeth to be, because in that year, the sums to be charged were fixed and determined upon every particular division; lands which were then appropriated to charities being exempted out of the valuation: therefore it is no hardship upon the neighbourhood that lands then exempted should be exempted still, for the other lands pay no more upon the account of such exemption: but if lands appropriated to charities since that time should by such appropriation become exempted, this would lay a greater burden upon all the rest, because the same individual sum upon the whole division is to be raised still.

[Scotland—See **Church in Scotland**.]

Seats in Churches—See **Church**.

Sees of Bishops—See **Cathedrals**.

Select Vestry—See **Churchwardens** [and **Vestry**.]

Sentence—[See **Practice**.]

Sentences upon the Church Wall—See **Church**.

Separatists—See **Dissenters**.

Sequestration (j).

1. *When the Writ of Sequestration issues* 588
2. *Nature of Writ* 590
3. *Duty of Sequestrator* 595
4. *Condition of Incumbent whose Living is sequestered* . 599

I. *When the Writ of Sequestration issues.*

[THE Commissioners for inquiring into the Practice and Jurisdiction of the Ecclesiastical Courts say in their Report (k):

[" Sequestrations issue under the following circumstances: 1st, In obedience to writs from the courts of common law, whereby the bishop is directed to levy certain sums in pursuance of the statutes regulating Queen Anne's bounty; 2dly, Under the various provisions contained in the statute 57 Geo. 3, c. 99, [and 1 & 2 Vict. c. 106, which has repealed 57 Geo. 3,] and in cases of outlawry; 3dly, In pursuance of decrees or orders emanating from the ecclesiastical courts, in cases where clergymen are proceeded against before those jurisdictions; and, lastly, during vacancies.

[" In all these cases, we apprehend the law clearly to be, that before any proportion of the profits of the benefice can be applied in payment of debts, or for any other purpose, the service of the church must first be provided for, out of those profits; and when this has been done, the buildings and fences in the glebe, and the chancel also when the incumbent repairs, ought to be sustained and kept in proper order. The right of nominating the sequestrator lies with the bishop; but when the sequestration issues on account of debts, it may often happen that the sequestration is committed to the creditor, or his nominee; in all other cases, the bishop exercises his right of nomination by selecting according to his own judgment.

[" By the existing law, the sequestrator has no power to compound for tithes; and his right of action for the recovery of the profits of the benefice is most inconveniently restricted."

When a living becomes void by the death of an incumbent, or otherwise, the ordinary is to send out his sequestration, to have the cure supplied, and to preserve the profits (after the expenses deducted) for the use of the successor (l).

During the
Vacancy of a
Benefice.

(j) [The origin of this term is derived from the Roman law: " Sequester dicitur apud quem plures eandem rem de quâ controversia est, deposuerunt. Dictus ab eo quod recurrenti aut quasi sequenti eos qui contendunt, committitur." (Dig. de Verb. signif. l. 110.) It was much disputed by the earlier canonists whether the sequestrator had not a right to present to the benefice; but the

negative is now universally adopted. See for a clear exposition of the canon law on this subject the titles " Usufruct," " Possession," " Sequestre," in M. de Maillane's Dict. de Droit Canon. See title **Dilapidations**, vol. ii. p. 152, and as to charges by a clergyman on his benefice, see title **Benefice**.—ED.]

(k) [Page 52.]

(l) God. Append. 14.

Sometimes a benefice is kept under sequestration for many years together, or wholly; namely, when it is of so small value, that no clergyman fit to serve the cure will be at the charge of taking it by institution. In which case, the sequestration is committed sometimes to the curate only, sometimes to the curate and churchwardens jointly (*m*). Where none will accept the Benefice.

Sometimes the fruits and profits of a living which is in controversy, either by the consent of parties, or the judge's authority, are sequestered and placed for safety, in a third hand. And thus where two different titles are set on foot, the rights are carefully preserved, and given to him for whom the cause is adjudged (*n*). During Suit.

And the judge is also wont to appoint some minister to serve the cure, for the time that the controversy shall depend; and to command those to whom the sequestration is committed, to allow such salary as he shall assign out of the profits of the church to the parson that he orders to attend the cure (*o*).

Sometimes for neglect of serving the cure, the profits of the living are to be sequestered (*p*). Neglect of Duty.

[Sequestrations issue in cases of outlawry. In cases of outlawry on civil process, a writ of sequestration will issue on a special *capias utlagatum*, finding that the defendant was possessed of an ecclesiastical benefice, but of no lay fee (*q*). But where the sheriff's return to such a writ was that the defendant had no lay goods, nor any lay fee, but that he was a beneficed clergyman, not stating the name or situation of the benefice, the court refused a writ of sequestration, but suggested a motion for a rule calling upon the sheriff to amend his return (*r*). Outlawry.

Sometimes when the houses and chancels that the incumbent is bound to repair, are ruined and ready to fall, if after due admonition they shall delay to begin to amend the same within two months, then the bishop of the diocese, that time being elapsed, shall sequester the fruits and tithes till those defects are amended; and though the admonition proceed from the archdeacon, yet the bishop only hath the power of sequestration (*s*). Dilapidations.

Sometimes upon the king's writ to the bishop to satisfy the debts to the incumbent (*t*). Debt.

And this is, where a judgment hath been obtained against a clergyman, and upon a *feri facias*, directed to the sheriff to levy the debt and damages, he returns that the defendant is a clerk beneficed having no lay fee. Whereupon a *levari facias*

(*m*) Johns. 121. See for this C. & J. 389.]

tit. Vacation.

(*n*) God. Append. 14.

(*o*) Watson, c. 30.

(*p*) Ibid. 15.

(*q*) [*In re Hind*, 1 Tyrw. 347; 1

(*r*) [*Rex v. Powell*, 1 Mees. & Wels. 321; *Rex v. Armstrong*, 3 C., M. & Ros. 205.]

(*s*) God. Append. 14 [*vide infra*.]

(*t*) Wats. c. 30.

is directed to the bishop to levy the same of his ecclesiastical goods, and by virtue thereof the tithes should be sequestered.

And in this case the bishop may name the sequestrators himself, or may grant the sequestration to such persons as shall be named by the party who obtained the writ.

If the sequestration be laid and executed before the day of the return of the writ, the mean profits may be taken by virtue of the sequestration, after the writ is made returnable, otherwise not (*u*).

Appeal.

Stratford. "If an appeal be made against a sentence of sequestration, and lawfully prosecuted, the party sequestered shall enjoy the profits, pending the appeal (*x*)."

[II. *Nature of Writ.*

[The sequestration (*y*) is a continuing execution, and the sequestrator must continue in possession until the debt is levied, and the bishop must return not the writ but the amount levied from time to time.

Case of
Arbuckle v.
Cowtan.

[The history and nature of the writ are very clearly stated in *Arbuckle v. Cowtan* (*z*). In this case, as will be seen, Lord Alvanley observes, that the writ does not confer possession on the sequestrator. The case was as follows:—

[“By articles of agreement in writing, dated the 17th day of March, 1785, between the Rev. Henry Poole, clerk, then and still being vicar of the parish of Hernhill, in the county of Kent, of the one part, and the above named defendant on the other part, it was agreed, that from Michaelmas 1784 the said Henry Poole, in consideration of the said defendant paying him 90*l.* a-year, on or before the 10th of December, and 30*l.* a-year to the curate, in two payments, viz. on the 9th of February and the 9th of August, and one guinea to the widows of clergymen in Kent, and 17*s.* in part of the tenths and the land-tax and parochial rates, should invest the said defendant with every claim he had as vicar of Hernhill aforesaid on the several occupiers of lands, wood, fruit, &c., together with the vicarage house, garden, orchard and glebe land, except all surplice fees and churchyard dues; but with proviso that necessary repairs to the vicarage house, barn, stable, and fences of the yard, and garden gates and styles should be at the costs and charges of the said Henry Poole, as well as any land-tax or poor's rates other than what the said vicarage was then charged with; and that the said defendant should suffer one John Groombridge, the then tenant of the vicarage house, to continue as long as he paid the yearly rent of 8*l.*; and that

(*u*) 3 Bl. Com. 418.

(*x*) Lind. 104.

(*y*) [*Marsh v. Fawcett*, 2 H. Bl. 582.]

(*z*) [3 Bos. & Pull. 322, 326.]

the said agreement should continue until either of the parties thereto should give notice to the contrary three months at least before Michaelmas, at which time of the year and no other the said agreement should cease and determine." By virtue of this agreement, the defendant, on the 17th day of March, 1785, aforesaid, entered upon the said premises in the said agreement mentioned, and hath continued from thence hitherto to hold and enjoy the same, under and by virtue of the said agreement, and hath duly performed the said agreement in all things therein contained on his part to be done up to Michaelmas, 1797. On the 3d day of October, 1797, the said Henry Poole, being a prisoner in the custody of the warden of his majesty's prison of the Fleet, at the suit of divers persons, for debts amounting in the whole to a less sum than 1200*l.*, and being entitled to the benefit of the act of parliament passed in the 37th year of his present majesty's reign, intituled, 'An Act for the relief of certain Insolvent Debtors,' he the said Henry Poole was, on the said 3d day of October, 1797, at the general quarter sessions of the peace for the city of London, duly discharged from his said imprisonment by virtue of the said act, and did then and there deliver in a schedule of his real and personal estate, according to the directions of the said act, in which schedule the said Henry Poole did (amongst other particulars of his estate and effects) insert the following article, viz.—'The vicarage of Hernhill in Kent, the tithes of which have been paid to me to Michaelmas, 1796, which I have applied for the support of myself and family.' By a deed-poll, dated the 10th day of February, 1798, William Rix, Esq., then being clerk of the peace for the city of London, did by virtue of the said act assign and convey all and singular the estate and effects of the said Henry Poole to the above-named plaintiffs, in trust, for the benefit of themselves and the rest of the creditors of the said Henry Poole. On the 11th of May, 1795, the said Henry Poole was directed by the Archbishop of Canterbury to augment the curate's salary from 30*l.* to 35*l.* a-year, whereupon the said defendant was requested to pay the additional 5*l.*, and to deduct it from the 90*l.* annual rent; so that the net rent payable by the said defendant from Michaelmas, 1797, was 85*l.* a-year only. The question reserved for the opinion of the court was, Whether under the circumstances above stated the plaintiffs were entitled to recover any, and what, sum of money from the defendant in this action? If the court should be of opinion that the plaintiffs were entitled to recover any sum of money from the defendant, a verdict to be entered for the plaintiffs for that sum, subject to the further directions of the Court of Chancery. If on the contrary the court should be opinion that the plaintiffs were not entitled to recover any thing in this action, then a verdict to be entered for the defendant, subject as aforesaid.

Arbuckle
v.
Cowtan.

How Debts
may be en-
forced against
Ecclesiastics
at Common
Law.

[“ Lord Alvanley, C. J. — With respect to all sums of money which had become due to the insolvent at the time when he took the benefit of the insolvent act, it is admitted that the plaintiffs are entitled to recover. Unquestionably every right and interest in possession, which had vested in the insolvent previous to the passing of the 37th of Geo. 3, c. 112., was by that act immediately transferred to the assignees; and whatever action might have been brought by the insolvent, may be maintained by the assignees. So long as the defendant continued in the occupation of the vicarage, he was liable to the payment of the stipulated sum; as far, therefore, as the action extends to the arrears which were due at the time when the insolvent took the benefit of the act, the claim of the assignees may be maintained. Supposing a commission of bankrupt to extend to persons in holy orders, still the question will be, Whether the assignees under this insolvent act have succeeded to the rights of the insolvent in all the revenues of the church of which he was vicar? for it is impossible to contend that they are entitled under the agreement, without also contending that if there had been no agreement they would have been in the same situation as the vicar himself, and would have been entitled to demand from the possessors of the glebe lands and from the terre-tenants of the parish the rent and tithes due to the vicar of Hernhill. In short, it must be argued, that although the Insolvent Act does not expressly make the assignees vicars, yet that it invests them with all the ecclesiastical rights of the vicar. It is material to consider how the common law stood with respect to the rights with which creditors of persons in holy orders and beneficed clerks were clothed. No one is ignorant that, at common law, land could not be taken into the hands of the creditor himself; the profits only could be taken by a writ of *levari facias* directed to the sheriff, who was thereby empowered to levy the profits arising from time to time for the benefit of the creditor. The common law was extremely jealous of obtruding any new tenant on the lord; it did not allow, therefore, any possession to be taken under the *levari facias*, but only the profits to be levied. By the statute of Westm. 2., which gave the writ of *elegit*, an alteration was introduced in this respect. By that act the creditor was permitted to make use of a process by which he was put into possession of the land itself. At all times, however, the king was entitled to take possession under an extent, for the objection to changing the tenant did not apply to the case of the king. His right was independent of the statute of Westm. 2.: but it must not be forgotten, that, while the common law remained unaltered, the king never claimed any authority to take possession of ecclesiastical rights or dues by the hands of his own ministers the sheriffs. He was always obliged to have recourse to a writ to the bishop, under which

Arbuckle
v.
Cowtan.

How Debts
may be en-
forced against
Ecclesiastics
at Common
Law.

the lands were sequestered. Under that writ possession was not given, but the ordinary was bound to take care that out of the revenues of the church the duties of the church should be provided for. We find, in 2 Inst. p. 4, that Lord Coke says, 'If a person be bound in a recognizance in the Chancery, or in any other court, &c., and he pay not the sum at the day, by the common law, if the person had nothing but ecclesiastical goods, the recognizee could not have had a *levari facias* to the sheriff to levy the same of those goods, but the writ ought to be directed to the bishop of the diocese to levy the same of his ecclesiastical goods.' In Gilbert on executions, p. 40, it is said, '*Elegit* does not lie of the glebe belonging to the parsonage or vicarage, nor to the churchyard; for these are each *solum Deo consecratum*;' and for this is cited Jenkins's Rep. 207, where the same doctrine is laid down; and also that no *capias* or *fieri facias* can issue against a clerk if it appears that he has no lay fee, but only a *levari facias* to the bishop. Jenkins refers to two cases from the Year-books, viz. 29 Edw. 3, 44. and 21 Edw. 4, 45. We have therefore complete authority for saying, that at common law no process ever issued to a sheriff to levy on ecclesiastical property the debt due in an action, and Gilbert is well warranted in saying that no *elegit* lies. Sir Wm. Blackstone, in the third volume of the Commentaries, p. 418, gives an account of the writ of sequestration to the bishop of the diocese, which he says is in the nature of a *levari* or *fieri facias* to levy the debt and damages *de bonis ecclesiasticis*, which are not to be touched by lay hands. The same account is given of the writ in Burn's Eccl. Law, tit. **Sequestration**. There has been much argument respecting the power which a clergyman had over his own benefice. It has never been contended, however, that a parson was ever seised in fee, he had only a qualified right in his living, and at common law could make no lease to bind his successor, unless confirmed by the patron and ordinary. In the reigns of Henry the Eighth, and Elizabeth, several statutes were passed, introducing further restrictions with respect to the power of ecclesiastics over their benefices. Until the 13 Eliz. c. 20, they all appear to have been made for the benefit of the successor: so great was the anxiety of the legislature, however, to prevent ecclesiastics from divesting their own rights, that the statute of 13 Eliz. c. 20, explained by 18 Eliz. c. 11, empowers them to take advantage of their own non-residence to defeat leases made by themselves. Such has been determined to be the effect of that statute in the late case of *Frogmorton d. Fleming v. Scott* (a). It is now clearly established that the half pay of an officer is not assignable, and unquestionably any salary paid for the performance of a public duty ought not to be perverted to other uses than those

(a) [2 East, 467.]

Arbuckle
v.
Cowan.
How Debts
may be en-
forced against
Ecclesiastics
at Common
Law.

Under the
earlier In-
solvent Acts.

for which it is intended. Notwithstanding the case of *Steuart v. Tucker* (b), in which it was held that the half pay of an officer was assignable in equity, it was expressly decided in *Flarty v. Odlum*, that it was not assignable at all, which decision met with general approbation. This doctrine is very analogous to that which has been adopted with respect to ecclesiastics; the same policy is applicable to both cases. Having considered in what manner debts might be enforced against ecclesiastics at common law, I will now consider whether the statutes relative to bankrupts and insolvents have introduced any alteration in this respect. That a private creditor should be able to avail himself of a writ of sequestration for the purpose of satisfying his debt out of the benefice of a clergyman, and yet that where the legislature has vested the whole property of the debtor in assignees for the benefit of the creditors in general, those assignees should not have any power to affect his benefice, would certainly be an anomaly in the law. Whether there be any means of obviating this anomaly, I will not pretend to say. Lord Hardwicke, in the case *ex parte Meymott*, abstains from laying down decisively in what manner the claims of the assignees upon such property might be made available. He seems, however, to think, that in a writ to the bishop, the assignees might have the same remedy as any other creditor. But he never hints at an idea that they could not take possession of the benefice in the same manner as they might of lay property. The only question in that case was, whether a clergyman could be made a bankrupt. Mr. Wilbraham, in arguing for the negative, insisted that his living could not be assigned by the commission, for that the assignees must take all or none; and if they took all, nothing would be left to provide for the service of the cure. Lord Hardwicke, who inclined to think that a clergyman might be a bankrupt, after noticing this objection, and stating the common law rule with respect to sequestration, says, 'I do not see (but I give no opinion), why the same method may not be followed under the commission of bankruptcy, for it does not appear to me that this would supersede the bishop's authority.' As a long time has elapsed since this opinion was thrown out, during which some clergymen must probably have rendered themselves obnoxious to commissions of bankrupt, I desired inquiries to be made respecting the mode of proceeding adopted under those commissions. But these inquiries have not produced any instance in which proceedings against a benefice have taken place. Nor shall I undertake to point out in what manner the assignees in this case must proceed. But although there may be difficulties in the mode of proceeding, we are not therefore to hold that the nature of the property

(b) [2 Bla. 1137.]

which a clergyman has in his benefice is changed by the operation of an insolvent act, or that the assignees under such an act will be entitled to demand and receive ecclesiastical dues. The agreement in this case is a mere letter of attorney given by the clergyman to the defendant. If this agreement could be deemed a lease, it would be void upon the face of it. It would be a lease on the parsonage house, with a covenant that the new tenant should occupy: this would be *felo de se*. Whatever advantage might be derived through the intervention of the ordinary, I am of opinion that by no conveyance of the party himself could he divest himself of his benefice. The same reasons which have induced the common law to prevent execution against a benefice by the hands of the king's civil ministers, may be urged with equal force against the action now brought by the assignees. We are therefore of opinion that the action is not maintainable so far as it relates to the rent which has accrued subsequent to the assignment under the insolvent act."

Arbuckle
v.
Cowtan.
Debts, how
enforced,
under the
earlier In-
solvent Acts.

[But under the Insolvent Debtors' Act of 7 Geo. 4, c. 57, continued by 1 Will. 4, c. 38, and 2 Will. 4, c. 44, it has been held, that the assignee of an incumbent discharged under this act is entitled to the balance of a sequestrator's account remaining in the registry upon the death of the incumbent; his claim was considered by the judge of the Consistory of London preferable to that of a builder who had repaired the rectory-house under the directions of the bishop, and to that of the new rector for dilapidations, who, the court observed, could only come in like any other creditor. The judge, after some doubt, held, that the presence of a personal representative before the court was not necessary, the remaining money belonging under the act to the assignee (c).]

Under the
later Insol-
vent Debtors'
Acts.

[It seems, moreover, that under the 7 Geo. 4, the assignees may, after an adjudication in the Insolvent Debtors' Court, obtain a sequestration on petition of the insolvent (d).—ED.]

III. *Duty of Sequestrator.*

It is usual for the ecclesiastical judge to take bond of the sequestrators, well and truly to gather and receive the tithes, fruits, and other profits; and to render a just account (e).

Bond of Se-
questrator.

And those to whom the sequestration is committed, are to cause the same to be published in the respective churches, in the time of divine service (f).

[It was decided not to be necessary that a writ of sequestration should be published before the return day of the *levari*

(c) [Little Hallingbury, Essex, 1 Ad. & Ell. 171.]
Curteis R. 557.]

(e) Wats. c. 30.

(d) [Bishop v. Hatch, (Clerk), 1 (f) Ibid.

facias on which it is founded, or that a copy should be fixed to the church door where that is not the usual mode of publication in the diocese of the sequestered benefice (*g*); as to the publication of decrees of the ecclesiastical courts under 7 Will. 4 & 1 Vict. c. 45, see title **Public Worship** in this volume.—
ED.]

It is best and most legal for the sequestrators to receive the tithes and dues in kind.

How and
where he is
to maintain
an Action
for Tithes.

But the sequestrators cannot maintain an action for tithes in their own name, at the common law, nor in any of the king's temporal courts; but only in the spiritual court or before the justices of the peace where they have power by law to take cognizance (*h*).

Thus, in the case of *Berwick v. Swanton*, T., 1692, it was resolved in the Court of Exchequer that a sequestrator cannot bring a bill alone for tithes, because he is but as a bailiff, and accountable to the bishop, and hath no interest (*i*).

After the sequestrators have performed the duty required, the sequestration is to be taken off, and application of the profits to be made according to the direction of the ordinary. And he shall allow to them a reasonable sum out of the profits, according to the trouble they shall have had in gathering the tithes. And he is also to allow for the supply of the cure, what shall be convenient, relation being had to the charge and to the profits, and likewise for the maintenance of the incumbent and of his family (in case where there is an incumbent), if he hath not otherwise sufficient to maintain them.

To what he
is entitled.

[The sequestrator is entitled to all the future profits, but not to the amount of the sequestered living (*k*); so it has been held, that a rector whose glebe was sequestered was entitled to a verdict in ejectment upon a demise laid before the sequestration took effect, but he could not have an "*habere facias possessionem*," because he was no longer entitled to possession (*l*).—ED.]

Amenable to
Ecclesiastical
Judge.

If the sequestrators refuse to deliver up their charge, they shall be compelled thereunto by the ecclesiastical judge: and if they shall, being called thereunto, delay to give an account, it is usual for the judge to deliver unto the party grieved, the bond given, with a warrant of attorney to sue for the penalty thereof to his own use at the common law (*m*).

Therefore, if the incumbent is not satisfied with what the sequestrators have done in the execution of their charge, his

(*g*) [*Bennett v. Apperley*, 6 B. & C. 630; 9 D. & R. 673. As to the effect of such writs in finding property, see *Giles v. Grover*, 1 Cl. & Finn. 74—177; *Lucas v. Nockells*, 10 Bing. 182.—ED.]

(*h*) *Johns*. 122.

(*i*) *Bunb.* 192.

(*k*) [*Waite v. Bishop*, 1 C., M. & R. 507; *Rex v. Armstrong*, 2 C., M. & R. 205.]

(*l*) [*Doe d. Morgan v. Bluck*, 3 Camp. 447; 6 B. & C. 630.]

(*m*) *Wats.c.* 30.

proper remedy is by application to the spiritual judge; and if he shall think himself aggrieved by the determination of such judge, he may appeal to a superior jurisdiction. Sometimes a bill in equity hath been brought, which yet, as it seemeth, ought not to be brought against the sequestrators solely, for that they are only bailiffs or receivers, and have no interest. As in the case of *Jones v. Barret*, H., 1724 (n), on a bill by the vicar of West Dean, in the county of Sussex, against the defendant, who was sequestrator, for an account of the profits received during the vacation, it was objected for the defendant, that the bishop ought to have been made a party, since the sequestrator is accountable to him for what he receives, and the court seemed to think the bishop should have been a party, but by consent, the cause was referred to the bishop of the diocese.

[In the case of *Hubbard v. Beckford* (o), a decree had been taken out in the Consistory of London to answer to a demand of dilapidations by the rector of Shepperton against Beckford, the person who had been receiving the profits of the living of Shepperton under a sequestration obtained against the late incumbent by virtue of the king's writ to the bishop of the diocese. Lord Stowell gave the following judgment:—

Case of
Hubbard v.
Beckford.
Demand for
Dilapidations
against Se-
questrator.

["This is an allegation offered on the part of a sequestrator, who has been appointed the receiver of the profits of the living of Shepperton under the king's writ, directed to the bishop, on which the sequestration has issued. It pleads, that the sequestrator has incurred sundry charges, which he desires to be permitted to stand in his account, and to be dismissed upon paying over the surplus, after the discharge of his own debt. The objection taken is not so much to the particular items of the account, as to the general principle. Some part of the allegation is merely introductory. With respect to what has actually been done under this sequestration, it is highly necessary that the court should have before it the account, which the sequestrator is bound to render to the ordinary, of what he has done, under the authority delegated to him. I shall therefore admit this allegation as to those parts, observing also that there ought to be stated the date of the first sequestration, an omission which must be supplied.

["It may be proper, however, to say a word on the general question, and with respect to the points which have been the subject of discussion in the argument, and which may come before the court again, at the final hearing of the cause. On the general principle, I am inclined to hold, that the sequestrator will be liable for dilapidations. The king's writ issues to the bishop to levy a *sum* for the discharge of the debt. This writ has been truly described as mandatory to the bishop, who

(n) Bunb. 192.

(o) [1 Consist. 307.]

Hubbard
v.
Beckford.
Demand for
Dilapidations
against Se-
questrators.

is, in a general sense, only ministerial. The sequestrator is a kind of bailiff to the bishop. There is no mention of any purpose but the payment of the particular debt: it is, however, a thing incident to, and inseparable from, the subject-matter itself, that there are certain duties and expenses for which the sequestrator is bound to provide.

[“The instrument issued under the authority of the bishop, and contains a clause of allowance for all necessary charges, and I do not know on what principle it can be maintained, that the repairs of the chancel, and of the parsonage, are not necessary charges. The clergyman is, by law, equally required to provide such repairs, as well as the performance of divine service, and he cannot exonerate himself from one of those duties more than from the other. The creditor is the person to whom the sequestration is usually granted; but that is only for the convenience of the proceeding under it, and by the authority of the bishop. The sequestration might have been granted to the churchwardens, or to others; and the creditor is to act, as any other person would be bound to act in that character,—he is not to give to himself that preference, which a third person could not be compellable to allow.

[“I throw out this observation, as the substance of my opinion on the general question, when it shall hereafter be brought fully before the court; and I am inclined to hold that the sequestrator will be liable for charges of this nature, as inseparable from the benefice; and that they could not be disjoined from the duties of the sequestration, even by the authority of the bishop, as observed in argument, even if he could be supposed to have sanctioned any such pretension.”

[“On a subsequent day, a further allegation was given in, pleading, in substance, that since Mr. Beckford had exhibited, on oath, the account of the tithes, profits and emoluments of the rectory of Shepperton, as by him collected and received, he had expended the sum of 112*l.* upon the two barns, and their appurtenances, and had caused them to be effectually reinstated and repaired. To the admission of this additional plea it was objected, that it was no answer to the general demand; that the sum, stated to be expended, was more than the estimate on that part of the premises, and had therefore been improvidently expended; that, as it had been done since the commencement of these proceedings, it was an act of the sequestrator in his own wrong, and could not be set against the general demand which had been made upon him.

[“The court said, if I understand the nature of this allegation, it means to plead, in answer to the libel claiming 74*l.* for one part of the dilapidations, that Mr. Beckford wishes to show that he has expended 112*l.* It is quite impossible that I should permit such an averment in opposition to the claim made upon him, for that part of the dilapidations; that, being

charged with dilapidations, on one item, to a particular amount, he has laid out more than the sum required. It is an irregularity, perhaps, that he should have done any thing to the barns since the time of giving in the libel in these proceedings. From that time, the matter was under the protection of the court, and perhaps the court would not exceed its legal power if it was to refuse to take any notice of such an expenditure. Equity may suggest, however, that he should be entitled to some allowance, but only to the amount of the sum claimed in the libel.

[“The court will therefore give him the opportunity of pleading simply, that he has repaired the barns; but it will not permit him to enter into a specification of the expenditure beyond the estimate of it in the article of the libel.

[The same learned judge observed in *Winfield v. Watkins*(p), “The sequestrator is bound to repair edifices belonging to the benefice. There can be no doubt that he may be compelled to do so by process from the bishop’s court. The repair of the church is as necessary a charge as the supply of the church itself. He may therefore be compelled by the bishop and churchwardens to make the repairs.” In another case where there were conflicting estimates, the tender of the defendant was affirmed with costs by the ecclesiastical court (q).

[In another case (*Campbell v. Whitehead*, reported in a note to *Hubbard v. Beckford*), Lord Stowell remarked that, “the court is bound not to delay the *immediate* execution of a writ, but to give the party all the benefit of priority.”

Immediate
Execution
of Writ.

[IV. *Condition of Incumbent whose Living is sequestered.*

[The power and character of the sequestrator, and the legal status of the incumbent whose living is sequestered, underwent much discussion in the Court of Queen’s Bench in a recent case (1839). The bishop had issued a sequestration to the vicar, and at the same time licensed him as stipendiary curate, assigning to him the vicarage-house and grounds as a residence, directing the sequestrator to pay him 120*l.* a year. The question was, whether the vicar had then such a possession of his ecclesiastical benefice as qualified him to act as a magistrate under 18 Geo. 2, c. 20, which require a freehold estate of the *clear* yearly value of 100*l.* It will be seen by the judgment why it was held that he was *not* qualified (r). Lord Denman delivered the opinion of the court as follows:

Case of *Pack v. Tarpley*.
Vicar sequestered and licensed as Curate disqualified to act as Magistrate.

(p) [2 Phill. 8.]

(q) [*North v. Barber*, 3 Phill. 307.]

(r) [*Pack v. Tarpley* (Clerk), 9 Ad. & Ell. 482. The argument of

counsel, Sir William Follett, for plaintiff, and Mr. Waddington, for defendant, refer to almost all the decided cases on sequestration.—Ed.]

Pack
v.
Tarpley.
Vicar seques-
tered and
licensed as
Curate dis-
qualified
to act as
Magistrate.

[“ This was an action brought upon the statute 18 Geo. 2, c. 20, for a penalty of 100*l.* against the defendant for acting as a justice of the peace without a proper qualification. By the 3rd section of the act, the proof of qualification lies on the defendant; and that qualification is contained in the 1st section, which enacts: [His lordship here read the section.] The case finds that the defendant is incumbent of a vicarage of the annual value of 500*l.*; that a writ of *sequestrari facias* was issued against him on the 8th April, 1834, at the suit of one Watkins, for 2270*l.* 6*d.*; that the bishop issued a sequestration, which was published on the 13th April, 1834, and possession taken under it; that the sequestrator has ever since received the rents and profits of the vicarage, but has not applied them to this, but to a previous sequestration, which was not given in evidence; that the bishop, by his licence, assigned to the defendant the vicarage-house as a residence, and the sum of 120*l.* *per annum* for serving the church as stipendiary curate, which stipend the defendant has received, and has resided in the vicarage-house before and since the sequestration, performing the duty; and that the vicarage-house *and grounds* were worth above 100*l.* a year. It was objected, on the part of the defendant, that the writ of *sequestrari facias* was not admissible in evidence, because the judgment roll in *Watkins v. Tarpley* contained no entry of an award of the writ; but no authority was shown for the necessity of such entry, nor do we think it at all important.

[“ Again, it was objected that nothing was applied by the sequestrator under this writ, and that it was not shown by any legal evidence how the profits of the vicarage were disposed of. The answer is, that the sequestrator is shown to have been in possession under the writ, and to have received the profits; whether he has disposed of them properly is immaterial to the present question. Much discussion took place as to the meaning of the words ‘in possession,’ in the first section of the act; whether they are used solely in contradistinction to the words ‘in reversion or remainder,’ in the latter part of the clause, or have reference to the actual possession also; and the words ‘to his own use and benefit,’ were also much commented on. But as our decision turns upon the part of the clause relating to incumbrances and charges, it is not necessary to give any opinion on the other parts. The question is, whether it appears by the facts found, that the defendant has an estate for life of the clear yearly value of 100*l.* over and above what will satisfy and discharge all incumbrances that affect the same.

[“ Now, whatever may be the true construction of the statute of 13 Eliz. c. 20, as to charges upon benefices, and whatever may be the proper rule to be established from the various

cases decided under that act, we can have no hesitation in holding that a sequestration is an incumbrance that affects the defendant's estate for life in his vicarage within the meaning of the act of parliament. The clear yearly value of 100*l.* contemplated by the act, is plainly that which comes into the pocket of the owner of the estate as such, after all other demands upon it are satisfied; and we are to see whether, upon the facts stated, such clear yearly sum of 100*l.* does come into the defendant's pocket as vicar. The difficulty in the case arises from his continuing to reside and occupy the house and grounds which are found to be above the yearly value of 100*l.* If he be in the occupation of them by right as vicar, notwithstanding the sequestration, and could not be put out from them or compelled to pay any rent for them by any proceeding whatever, it is impossible to say that he has not an estate for life in them, or say that they are affected by the sequestration; and if not, their value is sufficient. Now, with respect to the house, it seems clear that the defendant is in the occupation as vicar, and that the assignment of it to him as a residence by the bishop is merely void, inasmuch as the incumbent is bound to reside notwithstanding any sequestration, and the bishop could not turn him out, nor change his character from that of vicar to that of stipendiary curate. But it is not found by the case that the house alone is of the yearly value of 100*l.*; and as the onus lies on the defendant, we cannot presume it to be so. The grounds and stipend must therefore be taken into consideration, and with respect to them the case is very different. The sequestrator might undoubtedly let the grounds as well as any other part of the glebe, and raise a profit towards the purposes of the writ; and though they are not so let, but assigned to the defendant by the bishop, they, as well as the stipend of 120*l.* also assigned him by the bishop, are by no means enjoyed by him simply as vicar in his own right. The amount of the stipend seems to be in the discretion of the bishop, though probably that discretion would be exercised with reference to the salaries specified in the Stipendiary Curates Acts, in which case the stipend could not be less in respect of the vicarage in question than 120*l.*(*s*): and though the bishop cannot appoint any person to serve the church either instead of, or in addition to, the vicar (*t*), and cannot by his licence alter the vicar's character, and must assign to him the proper stipend out of the profits of the living, prior to any other payments, yet we are of opinion that the defendant, as regards the grounds and stipend, takes under the bishop, and not simply as vicar, and that his enjoyment of the grounds and stipend arises out of, and is under, the sequestration; so that

Pack
v.
Tarpley.

Vicar sequestered and licensed as Curate disqualified to act as Magistrate.

(*s*) [See 57 Geo. 3, c. 99, s. 55, c. 106.]
56, repealed by statute 1 & 2 Vict. (*t*) [See 1 & 2 Vict. c. 106, s. 99.]

it cannot be said in fact or in law that the defendant has an estate of the clearly value of 100*l.* over and above all incumbrances that affect the same. For these reasons we are of opinion that the defendant has failed to establish his qualification, and our judgment must be for the plaintiff. Judgment for the plaintiff (y)."

Sequestrations under 1 & 2 Vict. c. 106.

[The recent statute of 1 & 2 Vict. c. 106, empowers the bishop to sequester the profits of an ecclesiastical benefice in several cases, such as of illegal trading, non-residence, and non-insurance of the house of residence, &c. See, on this subject, sections 31, 54, 67, 90, 101, and for the mode of enforcing the sequestration and the right of appeal, sections 111, 112, 113, of this act, under title **Residence** (z). Sequestrations under this statute are to have priority over all others.—ED.]

Sermons—See Public Worship.

Sexton (a).

Nature of Office.

THE *sexton*, *segsten*, *segerstane*, (*sacrista*, the keeper of the holy things belonging to the divine worship,) seemeth to be the same with the *ostiarius* in the Romish Church, and is appointed by the minister or others, and receiveth his salary according to the custom of each parish.

Mandamus for.

It hath been adjudged that a mandamus lies to restore a sexton; though as to this the court at first doubted, because he was rather a servant to the parish than an officer, or one that had a freehold in his place; but upon a certificate shown from the minister and divers of the parish that the custom was to choose a sexton, and that he held it for his life, and that he had 2*d.* a year of every house within the parish, they granted a mandamus directed to the churchwardens to restore him (b).

T., 12 Geo. 1, *Olive v. Ingram* (c). In assumpsit for money had and received to the plaintiff's use, a case was made at nisi prius for the opinion of the court, that there being a vacancy in the office of sexton of the parish of St. Botolph without Aldersgate, in the city of London, the plaintiff and Sarah Bly were candidates; and Sarah Bly had 169 indisputable votes, and 40 which were given by women who were housekeepers and paid to the church and poor; that the plaintiff had 174 indisputable votes, and 22 other votes given by such women as

(y) [9 Ad. & Ell. 482.]

(z) [It will be seen also under this title, that 17 Geo. 3, c. 53, s. 6, gave the same power in some of these

cases.—ED.]

(a) [See **Parish**.]

(b) 3 Bac. Abr. 530.

(c) Str. 1114.

aforesaid: that Sarah Bly was declared duly elected; upon which the plaintiff brought a mandamus, and was sworn in, and the defendant had received 5s. belonging to the office. In this case two points were made: 1st, whether a woman was capable of being chosen sexton; and 2nd, whether women could vote in the election. As to the first, the court seemed to have no difficulty about it, there having been many cases where offices of greater consequence have been held by women, and there being many women sextons at that time in London. In the second year of Queen Anne a woman was appointed governor of Chelmsford workhouse; Lady Broughton was keeper of the Gatehouse; Lady Packington was the returning officer for members at Ailesbury. As to the second point, it was shown that women cannot vote for members of parliament or coroners, and yet they have freehold, and contribute to all public charges; and though they vote in the monied companies, yet that is by virtue of the acts which give the right to all persons possessed of so much stock; that military tenures never descended to them. But the court notwithstanding held, that this being an office that did not concern the public, or the care and inspection of the morals of the parishioners, there was no reason to exclude women who paid rates from the privilege of voting; they observed, here was no usage of excluding them stated, which perhaps might have altered the case; and that as this case was stated, the plaintiff did not appear to have been duly elected, and therefore there ought to be judgment against him.

Women may
be Sextons.

[The celebrated Anne, Countess of Pembroke, Dorset, and Montgomery, sat on the bench with the judges at the assizes at Appleby as hereditary sheriff of Westmoreland.—ED.]

M., 5 Geo. 1, *The King v. The Churchwardens of Thame in Oxfordshire* (d). An application was made to the Court of King's Bench for a mandamus to restore John Williams to the office of sexton. A return was made that he held it *at pleasure*. The court refused the mandamus without a certificate that he was chosen *for life*.

Mandamus
refused for
Office.

[It has been said, that the common law considers sextons to have a freehold in their office, and has never decided that a writ of *quo warranto* would not lie in the case of a sexton (e).

Quo Warranto.

[But in the case of the parish of Stoke Damerel, Mr. Justice Patteson said, "I am confident that the question" (*i. e.* the right to elect a sexton), "cannot be tried on a *quo warranto*; the course is to grant a mandamus for the election." The same learned judge observed, that the general right to elect the sexton was in the rector. See this case at length under title

(d) Str. 115.

5 Ad. & Ell. 584; *Stokes v. Lewis*,

(e) [See 2 Roll. Abr. 234; *Ile's case*, 1 Ventr. 153; *Rex v. Churchwardens of St. James's, Taunton*, 1 Cowp. 413;

1 T. R. 20; case of sexton chosen by two parishes.—ED.]

Parish, p. 81 in this volume. The Church Building Acts contain the following provisions as to sexton:—

59 Geo. 3,
c. 134.

Pew Rents.

58 G. 3. c. 45.

Fees and
Offerings.

Clerks and
Sextons of
Divisions of
Parish may
recover their
Fees, &c.

Compensa-
tions to Clerks
and Sextons.

[By 59 Geo. 3, c. 134, s. 6, commissioners may unite parts of contiguous parishes and extra-parochial places into separate districts for ecclesiastical purposes, and make loans for building chapels for the use of such districts, and constitute such district consolidated chapelries; “and the pew rents in such chapel shall be fixed, and salaries to the minister and clerk assigned therefrom, in such manner as is directed in the said recited act or in this act concerning pew rents and salaries in separate or district parishes; and all fees and offerings which may arise and accrue within such chapelry, according to such table of fees as the commissioners shall make, with the approbation of the bishop, may be demanded, received, sued for, prosecuted and recovered by the spiritual person having cure of souls therein, and by the clerk and sexton of such chapelries, in like manner as if every such chapelry was a distinct parish.”]

Sect. 10. “That when any parish shall be divided under the provisions of the said recited act or this act, all fees, dues, profits and emoluments belonging to the parish clerk or sexton respectively of any such parish, whether by prescription, usage or otherwise, which shall thereafter arise in any district or division of any parish divided under the provisions of the said recited act, shall belong to and be recoverable by the clerks and sextons respectively of each of the divisions respectively of the parish to which they shall be assigned, in like manner in every respect and after the same rate as they were before recoverable by the clerk and sexton respectively of the original parish; and it shall be lawful for the said commissioners in every such case to ascertain and make compensation, in manner directed by the said recited act in cases of compensation by reason of loss of fees, for any loss of fees, dues, profits and emoluments which any clerk or sexton may sustain by reason of any such division.”—ED.]

Sick.

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| 1. Visitation of the Sick . . . 604 | 3. Departing out of this Life . 606 |
| 2. Communion of the Sick . . . 605 | |

I. Visitation of the Sick.

BY canon 76, when any person is dangerously sick in any parish, the minister or curate having knowledge thereof shall resort unto him or her (if the disease be not known or probably suspected to be infectious), to instruct and comfort them in their distress, according to the order of the communion book,

if he be no preacher, or if he be a preacher, then as he shall think most needful and convenient.

And by the rubric before the office for the visitation of the sick, when any person is sick notice shall be given thereof to the minister of the parish, who shall go to the sick person's house, and use the office there appointed.

And the minister shall examine the sick person whether he repent him truly of his sins, and be in charity with all the world; exhorting him to forgive from the bottom of his heart all persons that have offended him; and if he hath offended any other, to ask them forgiveness; and where he hath done injury or wrong to any man, that he make amends to the uttermost of his power. And if he hath not before disposed of his goods, let him then be admonished to make his will, and to declare his debts, what he oweth and what is owing to him, for the better discharge of his conscience and the quietness of his executors. But men should often be put in remembrance to take order for the settling of their temporal estates whilst they are in health.

And the minister should not omit earnestly to move such sick persons as are of ability to be liberal to the poor.

II. *Communion of the Sick.*

By a constitution of Archbishop Peccham, the sacrament of the eucharist shall be carried with due reverence to the sick, the priest having on at least a surplice and stole, with a light carried before him in a lantern with a bell, that the people may be excited with due reverence, who by the minister's discretion shall be taught to prostrate themselves, or at least to make humble adoration wheresoever the King of Glory shall happen to be carried under the cover of bread (*f*).

But by the rubric of the 2 Ed. 6, it was ordered that there shall be no elevation of the host, or showing the sacrament to the people.

By the present rubric before the office of the communion of the sick it is ordered as follows: "Forasmuch as all mortal men be subject to many sudden perils, diseases, and sicknesses, and ever uncertain what time they shall depart out of this life, therefore to the intent they may be always in a readiness to die whensoever it shall please Almighty God to call them, curates shall diligently from time to time (but especially in the time of pestilence or other infectious sickness) exhort their parishioners to the often receiving of the holy communion of the body and blood of our Saviour Christ, when it shall be publicly administered in the church; that so doing they may, in case of sudden visitation, have the less cause to be disquieted for lack

of the same. But if the sick person be not able to come to the church, and yet is desirous to receive the communion in his house, then he must give timely notice to the curate, signifying also how many there are to communicate with him (which shall be three or two at the least); and having a convenient place in the sick man's house, with all things necessary so prepared that the curate may reverently minister, he shall there celebrate the holy communion.

But if a man, either by reason of extremity of sickness, or for want of warning in due time to the curate, or for lack of company to receive with him, or by any other just impediment do not receive the sacrament of Christ's body and blood, the curate shall instruct him that if he do truly repent him of his sins, and stedfastly believe that Jesus Christ hath suffered death upon the cross for him, and shed his blood for his redemption, earnestly remembering the benefits he hath thereby, and giving him hearty thanks therefore, he doth eat and drink the body and blood of our Saviour Christ profitably to his soul's health, although he do not receive the sacrament with his mouth.

In the time of the plague, sweat, or other such like contagious times of sickness or diseases, when none of the parish can be gotten to communicate with the sick in their houses, for fear of the infection, upon special request of the diseased the minister may only communicate with him.

III. *Departing out of this Life.*

Can. 67. When any is passing out of this life a bell shall be tolled, and the minister shall not then slack to do his last duty. And after the party's death (if it so fall out) there shall be rung no more but one short peal, and one other before the burial, and one other after the burial.

And this tolling of the bell seemeth to have been originally founded on the doctrine of masses satisfactory, or prayers for the dead; that every person upon hearing of the bell should apply himself to prayer for the soul of the person departing or departed out of this life.

And the alms usually given at funerals seemeth to have been intended for the like purpose.

Sidesmen—See **Churchwardens**.

[**Significavit**—See **Excommunication** and **Practice**.]

Simony.

1. <i>By the Canon Law</i> 607 2. <i>By Statute</i> 615	3. <i>Punishable in Ecclesiastical Court</i> 641 4. <i>Other Matters</i> 648
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I. *By the Canon Law.*

SIMONIACUS is he who maketh a corrupt contract; and *simoniacè promotus* is he who is promoted upon such contract, although he was not privy to it himself.

[According to the canon law, the most general division of simony is into (*g*), 1. Mental; 2. Conventional; 3. Real. The first being where the advantage stipulated for is future, the latter where it precedes the appointment to the benefice.

[The following sketch of the origin of simony and of the penalties incident to it under the canon law, is taken from Dr. Phillimore's learned judgment in the case of *The Dean of York* (*h*). "It deduced its appellation from the rebuke given by the Apostle St. Peter to the individual whose name it has stamped with infamy, and rendered execrable to posterity, for his attempt to barter money for spiritual gifts. 'Let thy money perish with thee, because thou hast thought that the gift of God might be purchased with money (*i*).'

[“Accordingly, from the very commencement of the Christian era simony has been stigmatized as the greatest of offences, denounced as such by all the memorable councils of the church, and treated in the body of the canon law as a crime in comparison of which all other crimes sink into insignificance,—*pro nihilo æstimanda sunt*.

[“Simony was prohibited in one shape by the second canon of the Council of Chalcedon, in another by the third Council of Lateran (1179), and by all the expounders of the canon law who flourished between these periods, which I mention the rather because these councils and the fourth Council of Lateran (1215) have frequently been recognized by the temporal courts as forming an integral part of the ecclesiastical laws of England.

[“It is very true, that by the Council of Chalcedon the sale of holy orders and of inferior offices is specified as the objects of condemnation and punishment; in the early period of Christianity simony was necessarily limited to these objects—the teachers of the Gospel were poor and incapable of possess-

(*g*) [Dict. de Droit Canonique, par Durand de Maillane, Com. iv. p. 503.]

(*h*) [This judgment was reversed by the Court of Queen's Bench, as has been seen under the title *Præbende*

leges and Restraints of the Clergy, see p. 364 of this volume; but the question of simony, as will be seen below, was not raised before the court. —ED.]

(*i*) [See 3 Inst. 153.]

ing benefices; for it was not till a much later period that the Church of Christ was admitted to have a place in the *Collegia licita* of the empire.

[“ But it by no means follows that, because, by the ancient canons of the church, simony is more especially designated in connection with the purchase and sale of holy orders, whereas in the canons of the later ages little mention is heard of this, and they are wholly directed against simony in the collation and provision of benefices:—that therefore the church attaches a different notion to simony now from that which the canons applied to it, or thought the crime of simony more odious than she does at this day. The view of the ancients and moderns has been invariably the same, and that the former have principally inveighed against simony of the one description, the latter against simony of the other description, arises not from any different view taken by the church as to the nature of the offence, but from the change of discipline which change of times and manners has rendered necessary.

[“ ‘Semper enim ecclesiæ scopus in condemnatione turpis criminis fuit, ut omnis in electione ministrorum ecclesiæ caveretur venalitas, nec in electione illorum munera sed merita attenderentur. Quod ut obtineretur prioribus ecclesiæ sæculis, præcipuè invigilandum fuit ut à sacris ordinibus omnis venalitas arceretur: posterioribus verè temporibus non tam contra simoniacas ordinationes, quam simoniacas beneficiorum provisiones agendum fuit: utpote quod jam priores raræ—posteriores verè frequentiores, nec minus perniciosæ, evasissent ob mutatam lapsu temporis disciplinam.’

[“ Alexander II., who occupied the papal chair in the middle of the eleventh century, applied the provisions of the second canon of the Council of Chalcedon to those who trafficked in the purchase and sale of benefices, and his epistle to the clergy and people of Lucca is to be found in the body of the canon law in the Epistles of Gratian (*k*).

[“ ‘Si quis divinorum præceptorum et animarum salutis immemor, beneficium ecclesiæ iniquâ cupiditate ductus vendere vel emere temerario ausu præsumpserit, sicut in Chalcedonensi Consilio definitum est, gradûs sui periculo, eum subjacere decernimus, nec ministrare possit ecclesiæ quam pecuniâ venalem fieri concupivît.’

[“ Cœlestus II., who was pope in the twelfth century, lays down the law in these words: ‘Si quis in ecclesiâ ordinationem vel promotionem per pecuniam acquisiverit, acquisitâ prorsus careat dignitate.’

[“ And in the Extravagantes (*l*) we find: ‘Qui dignitates ecclesiasticas simoniacè acquisiverit—illis sit ipso jure privatus et in futurum inhabilis ad eas et quamvis alias obtinendas.’

(*k*) [X. Causæ 1, qu. 3, c. 9.]

(*l*) [Extr. Pauli 2.]

[“ And again: ‘ Qui quomodolibet simoniam commiserit dando vel recipiendo ordines vel beneficiorum præsentationes excommunicatus habeatur.’

*By the
Canon Law.*

[“ The eighth article of the third (*m*) Council of Lateran forbids even the gift or promise of the next presentation to any ecclesiastical benefice. It is headed thus: ‘ Ne ecclesiastica beneficia alicui promittantur antequam vacent.’ And then proceeds to enact: ‘ Nulla ecclesiastica ministeria seu etiam beneficia, vel ecclesiæ, alicui tribuantur seu promittantur antequam vacent.’ Words express against any promise whatsoever connected with the expectation of a vacancy.

[“ The third (*n*) title of the fifth book of the Decretals is devoted to the subject of simony. The commentator in the gloss introduces the subject by stating, that having dealt with accusers and calumniators, it remains to look at the crimes with which persons may be charged, amongst which simony obtains the first place. The first chapter is headed, ‘ De simoniâ, et ne aliquid pro spiritualibus exigatur vel promittatur.’

[“ And Lancelottus, the most concise and perspicuous of commentators, in discussing the text, gives this definition: ‘ Simonia nihil aliud est quam studiosa voluntas sive cupiditas emendi vel vendendi spiritualia vel spiritualibus annexa (*o*).’

[“ And again: ‘ Contrahitur ergo simonia cum quis sacra quodammodo in commercium deducit.’ And in another passage: ‘ Simonia est dare pecuniam pro vicariatu vel alia administratione rerum spiritualium.’

[“ The principles which have governed these decisions of the Catholic Church (I mean the Church of Christ) have always been ‘ Gratis accepistis, gratis date.’ And the only point to be ascertained has been ‘ num quovis modo per temporalia ad canonicatum perveniatur, id solum sufficere judicans ut non gratis et per consequens simoniacè pervenire censeatur.’ And again: ‘ Impudentissimum proinde prætextum detestamur, qui de solo proventu reque temporariâ canonicatûs se pacisci, cum ea spiritualia tam arcto sit annexa vinculo ut non magis ab eâ develli queat quam in homine vivo manente corpus a suâ animâ.’

[“ It is clear that the purchase or sale of the reversion of a benefice — for whether a benefice or a dignity is immaterial — was simoniacal; because, to use the language of an eminent canonist, ‘ cum enim execranda simonia sit episcopatum vendi, similiter æstimandum de ceteris beneficiis, quæ veluti membra et portiones quædam sunt episcopatûs.’

[“ It may be proved, also, by abundant citations from the canon law, that even the purchase of the reversion of a benefice by a father, though the son was kept in ignorance of it, was simoniacal on the part of the son (*p*).

(*m*) [A. D. 1179.]

(*o*) [Instit. Can. l. 3, t. 3.]

(*n*) [Corpus Juris Canonici, lib. 5, tit. 3, c. 749.]

(*p*) [An anecdote is related of Manguin, Bishop of Nismes, who ap-

*By the
Canon Law.*

[“ Authorities upon this subject might be multiplied *ad infinitum*; but I would especially refer to the Commentaries of Van Espen (*q*) on this head, which will be found in his seven chapters *De simoniâ circa beneficia*, as well on account of the deservedly high reputation of the author as of the learned industry with which he has discussed and exhausted all that can be brought to bear on this subject. I would refer also to the *Vetus et Nova Ecclesiæ Disciplina* of Thomassin (*r*).

[“ The question of simony, and the opinions of the Gallican Church respecting it, are also ably treated in the excellent and useful work of Durand de Maillane (*s*), and in the well known Dictionary of Denisart (*t*): both the one and the other establish and confirm the doctrine which I have laid down.

[“ Throughout the whole body of the canon law, whether we look to the text or to the commentators, the technical distinctions between immediate and reversionary possession are unknown. The prohibition is distinct and explicit, and is unequivocally opposed to all traffic of any description concerning ‘*spiritualia, vel spiritualibus annexa*.’

[“ No fact can be better established than that the Church of England, in her transition from the errors of Popery to the purer doctrines of the reformed religion, retained much of the discipline of the Roman Catholic Church, and above all, that she retained inviolate all the laws which had been so long inculcated by the Gregorian Code and the canonical jurists against simony. Simony abounded in the middle ages, and laws were accumulated on laws to repress and coerce it; happily with us the crime has been less prevalent: but still the ancient laws are the same, they have undergone no change, they are still a part and parcel of the ecclesiastical jurisprudence of England. The third Council of Lateran (*u*) is clear and express, and this Council of Lateran, as well as the fourth (*x*), is embodied in our laws.

peared at the Council of Rheims, in 1094, at which Leo IX. presided in person, and confessed that his bishopric had been purchased for him by his parents *se tamen ignorante*, and stated that he was ready to resign it in the hands of the pope and council, as he preferred surrendering the functions to retaining it at the hazard of his soul, and laid his crozier at the feet of the pope: but as the simony had been committed without his privity or consent, he was required to take his oath of the fact; another crozier was put into his hands, and he was reinstated in his episcopal functions.

[So when a prebendary discovered that his father had purchased his stall for him when in his minority, he being ignorant of the fact, on arriving at

years of discretion he resigned it into the hands of the superior of the convent. The chapter re-elected him, but placed him last in the choir: he appealed to the pontiff (Clement III.) to be reinstated in his old place, who enjoined him to be content, adding, *ratione primæ receptionis nihil audeas in ipsâ ecclesiâ vindicare*.]

(*q*) [Van Espen, *Juris Univ. Eccles.* pars 2, tit. 3.]

(*r*) [Thomassin, vol. iii. (fol. edit.) published at Leyden, 1705.]

(*s*) [Dictionnaire de Droit Canonique, par Durand de Maillane, tom. iv. p. 503.]

(*t*) [Denisart, vol. iii.]

(*u*) [A.D. 1179.]

(*x*) [A.D. 1215.]

[“ Lyndwood (*y*), our own canonist, whose authority is unquestionable, lays it down in his Provincials,—under the head of *Ne quis Ecclesiam nomine dotalitatis transferat, vel pro præsentatione aliquid accipiat*,—‘ Nulli liceat ecclesiam nomine dotalitatis ad aliquem transferre, vel pro præsentatione alicujus personæ pecuniam, vel aliquod aliud emolumentum, pacto interveniente, recipere. Quod si quis fecerit, et in jure convictus vel confessus fuerit, ipsum, tam regiâ quam nostrâ freti auctoritate, patronatu ejusdem ecclesiæ in perpetuum privari volumus.’

[“ And Ayliffe thus defines simony:—‘ Simony, according to the canonists, is defined to be a deliberate act, or a premeditated will and desire of selling such things as are spiritual, or of any thing annexed unto spirituals, by giving something of a temporal nature for the purchase thereof; or in other terms it is defined to be a commutation of a thing spiritual or annexed unto spirituals, by giving something that is temporal.’

[“ By the injunctions (*z*) published successively by Edw. VI. in 1547, and by Queen Elizabeth in 1559, it is thus provided: ‘ To avoid the detestable sin of simony, because buying and selling of benefices is execrable before God, therefore all such persons as buy any benefices or come to them by fraud and deceit shall be deprived thereof and made incapable at any time after to receive any spiritual preferment, and such as sell them or by any colour bestow them for their own gain and profit shall lose their right and title to the patronage.’ Afterwards in the Constitutions and Canons Ecclesiastical, agreed upon in the Synod of London in 1603, and confirmed by the king’s authority under the great seal of England—canons not in any way binding on the laity, but obligatory on the clergy—the fortieth of these canons has an essential and immediate bearing on the point at issue. No one who is at all conversant with the legal writings and commentaries of the canonists, can read this fortieth canon without being convinced that it is deeply imbued with the soundest principles of the canon law on the subject of simony; and as it is universally binding on the clergy, and professes to expound the discipline of the Church of England on this point, it becomes the bounden duty of every ecclesiastical jurisdiction, however constituted, to give force to the due execution of this law to the fullest effect (*a*).”—ED.]

Langton. “ We strictly forbid any man to resign his church, and then accept the vicarage of the same church from his own substitute, because in this case some unlawful bargain may be well suspected; and if any shall presume to do contrary here-

(*y*) [Lib. v. tit. 7.]

(*z*) [See also Reformatio Legum, f. 29, 6.]

(*a*) [Dean of York’s case, 27—36, published 1841. See also section 9 of

31 Eliz. c. 6, &c., *post*, 616, that the general ecclesiastical law is not affected by the statute law on this subject.—ED.]

*By the
Canon Law.*

unto, the one shall be deprived of his vicarage, and the other of his parsonage (k)."

It may seem strange that any one should choose to be vicar rather than rector; but as there might in some particular cases be other reasons for it, so there was one very apparent reason, viz. that the Lateran council under Innocent III. had forbidden the holding two churches, that is, two rectories, but not two vicarages, or a rectory and a vicarage. For though the Lateran canon against pluralities was not yet put in execution here, yet the clergy were apprehensive that this would soon be done (l).

Wethershead. "It shall not be lawful to any man to transfer a church to another in the name of a portion, or take any money or covenanted gain for the presentation of any one: and if any should be found guilty hereof, by conviction or confession, we do decree, by the king's authority and our own, that he shall for ever be deprived of the patronage of that church (m)."

In the Name of a Portion.]—That is, as a portion from a father or grandfather to his son or grandson (n).

We do decree by the King's Authority.]—Lindwood says (o), that *de facto* the king of England hath cognizance in causes of the right of patronage, which this constitution takes notice of as such, although, he says, the contrary is true by the canon law.

Shall for ever be deprived of the Patronage.]—Which seemeth to be intended during his life, and not to extend to his heirs after him, so as to punish them for their father's or other ancestor's crime (p).

And Sir Simon Degge observes upon this, that a canon is not sufficient to deprive a man of his freehold or inheritance; and this canon (he says) was never put in execution, or attempted so to be, so far as he can find (q).

Othobon. "Whereas we understand that it frequently happeneth that when a presentation is to be made to a vacant church, he who is to be presented first maketh a bargain with the patron for a certain sum to be paid to him yearly out of the profits of the church, and he who hath made such contract is presented to the church, we, intending to provide against this act of simony and detriment to the church, do utterly revoke all pensions heretofore imposed on parish churches, unless they who have or receive the same, are warranted from the beginning by lawful prescription, or special privilege, or other certain right (r).

Neither was this canon (saith Sir Simon Degge) of better effect than the other as to the making contracts void, which

(k) Lind. 107.

(l) Johns. Langt.

(m) Lind. 281.

(n) Johns. Wethers.

(o) Lind. 281.

(p) Ibid.

(q) Degge, p. 1, c. 5.

(r) Athon, 135.

were only determinable at the common law, where this canon could not be pleaded in bar (s).

But there were some general canons (he says) of the church of greater force, whereby a person simoniacally promoted is punished by deprivation, and a simoniac by deprivation and perpetual disability, not only as to the church he was presented to upon a simoniacal contract, but also as to all others (t).

Simony is the more odious (Lord Coke says) because it is ever accompanied with perjury, for the presentee is sworn to commit no simony (u).

Thus, by a canon of Archbishop Langton, it is ordained as followeth: "We do decree, that the bishop shall take an oath of him who shall be presented, that for such presentation he neither promised nor gave any thing to the person presenting him, nor made any agreement with him for the same, especially if he who is presented be probably suspected of the same (x)."

Bishop.—Or other ordinary who hath power to grant institution (y).

He neither promised.—By word or other stipulation (z).

Nor gave.—Either by exchange or recompense, or confirmation of what had been given before, or by bequest, or remission (a).

To the Person presenting him.—And if he promise any thing to another, although it be not to him who hath the presentation, yet if it be so that he shall not otherwise have the benefice, this also is simony (b).

And by Can. 40, "To avoid the detestable sin of simony, because buying and selling of spiritual and ecclesiastical functions, offices, promotions, dignities and livings is execrable before God, therefore the archbishop and all and every bishop or bishops, or any other person or persons having authority to admit, institute, collate, instal, or to confirm the election of any archbishop, bishop, or other person or persons, to any spiritual or ecclesiastical function, dignity, promotion, title, office, jurisdiction, place, or benefice with cure, or without cure, or to any ecclesiastical living whatsoever, shall before every such admission, institution, collation, installation or confirmation of election, respectively minister to every person hereafter to be admitted, instituted, collated, installed or confirmed, in or to any archbishopric, bishopric, or other spiritual or ecclesiastical function, dignity, promotion, title, office, jurisdiction, place, or benefice with cure or without cure, or in or to any ecclesiastical living whatsoever, this oath in manner and form following, the same to be taken by every one whom it concerneth, in his own person, and not by a proctor:—

The Oath
against Si-
mony by
Canon 40.

(s) Degge, p. 1, c. 5.

(t) Ibid. See titles *Adbowson* and

Deprivation.

(u) 3 Inst. 156.

(x) Lind. 108.

(y) Lind. 108.

(z) Ibid.

(a) Ibid. 109.

(b) Ibid.

*By the
Canon Law.*

"I, N. N., do swear, that I have made no simoniacal payment, contract, or promise, directly or indirectly, by myself, or by any other to my knowledge or with my consent, to any person or persons whatsoever, for or concerning the procuring and obtaining of this ecclesiastical dignity, place, preferment, office, or living [respectively and particularly naming the same, whereunto he is to be admitted, instituted, collated, installed, or confirmed], nor will at any time hereafter perform or satisfy any such kind of payment, contract or promise made by any other without my knowledge or consent. So help me God through Jesus Christ."

And this oath, whether interpreted by the plain tenour of it, or according to the language of former oaths, or the notions of the catholic church concerning simony, is against *all* promises whatsoever (c).

The Oath
against Si-
mony under
Canon 40 not
abolished
with the Oath
ex officio.

Therefore, though a person comes not within the statute of the 31 Eliz. hereafter following, by promising *money, reward, gift, profit, or benefit*, yet he becomes guilty of perjury if he takes this oath after any promise of what kind soever (d).

Dr. Watson queries whether the oath against simony be not abolished with the oath *ex officio*; but Mr. Johnson says, he may as well query the oaths of allegiance and supremacy, for that a clerk is no more obliged to accuse or purge himself of simony by the one, than of rebellion or popery by the other (e).

Which latter opinion is agreeable to the general practice and allowance, especially as the makers of the statute which repealeth the oath *ex officio*, do not seem to have had any thought or intention of touching upon this oath against simony (f); albeit the reason here alleged may of itself perhaps not be sufficient, for the oaths of allegiance and supremacy are enjoined by statutes subsequent to that which abolished the oath *ex officio*.

Which statute abolishing the oath *ex officio* is as followeth, viz. "It shall not be lawful for any archbishop, bishop, vicar-general, chancellor, commissary, or any other spiritual or ecclesiastical judge, officer, or minister, or any other person, having or exercising spiritual or ecclesiastical jurisdiction, to tender or administer unto any person whatsoever, the oath usually called the oath *ex officio*, or any other oath whereby such person to whom the same is tendered or administered, may be charged or compelled to confess, or accuse, or to purge him or herself of any criminal matter or thing, whereby he or she may be liable to censure or punishment, any thing in this statute, or any other law, custom or usage heretofore to the contrary, in anywise notwithstanding (g).

In the case of *The King v. Lewis* (h), M., 4 Geo. 1, an information was moved for against a clergyman for perjury at his admission to a living, upon an affidavit that the presentation

(c) Gibs. 802.

(d) Ibid.

(e) Wats. c. 15; Johns. 73.

(f) 4 Bac. Abr. 475, Acc.

(g) 13 Car. 2, c. 12, s. 4.

(h) Str. 70.

was simoniacal. But the court refused to grant it till he had been convicted of the simony.

*By the
Canon Law.*

II. *Simony by Statute.*

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| 1. <i>Simony by 31 Eliz. c. 6</i> . . . 615 | 2. <i>Resignation Bonds, before and since the 9 Geo. 4, c. 94</i> . 622 |
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1. *Simony by 31 Eliz. c. 6.*

*By Statute.
31 Eliz. c. 6,*

By the 31 Eliz. c. 6, s. 4 (i), "For the avoiding of simony and corruption in presentations, collations and donations of and to benefices, dignities, prebends, and other livings and promotions ecclesiastical, and in admissions, institutions, and inductions to the same."

Sect. 5. "It is enacted, that if any person or persons, bodies politic and corporate, shall or do, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for or in respect of any such corrupt cause or consideration, every such presentation, collation, gift and bestowing, and every admission, institution, investiture and induction thereupon, shall be utterly void, frustrate, and of none effect in law; and it shall be lawful for the queen, her heirs and successors, to present, collate unto, or give, or bestow, every such benefice, dignity, prebend and living ecclesiastical for that one time or turn only; and all and every person or persons, bodies politic and corporate, that shall give or take any such sum of money, reward, gift, or benefit, directly or indirectly, or that shall take or make any such promise, grant, bond, covenant, or other assurance, shall forfeit and lose the double value of one year's profit of every such benefice, dignity, prebend, and living ecclesiastical; and the person so corruptly taking, procuring, seeking or accepting any such benefice, dignity, prebend, or living, shall thereupon and from thenceforth be adjudged a disabled person in law to have or enjoy the same benefice, dignity, prebend, or living ecclesiastical (k)."

Sect. 6. "And if any person shall for any sum of money, reward, gift, profit, or commodity whatsoever, directly or indirectly (other than for usual and lawful fees), or for or by reason of any promise, agreement, grant, covenant, bond or other assurance of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, admit, institute, instal, induct, invest or place any person in or to any benefice with

(i) [See the remarks of Lord Mansfield and Wilmut, J., on the public utility of the statutes forbidding simony, 3 Burr. 1514.—ED.]
(k) [See 3 Inst. 153; *Smith v. Shelbourn*, Hob. 165.]

31 Eliz. c. 6.

cure of souls, dignity, prebend, or other ecclesiastical living, every such person so offending shall forfeit and lose the double value of one year's profit of every such benefice, dignity, prebend, and living ecclesiastical; and thereupon, immediately from and after the investing, installation or induction thereof had, the same benefice, dignity, prebend and living ecclesiastical shall be eftsoons merely void, and the patron or person to whom the advowson, gift, presentation or collation shall by law appertain, shall and may by virtue of this act present or collate unto, give and dispose of the same benefice, dignity, prebend, or living ecclesiastical, in such sort to all intents and purposes, as if the party so admitted, instituted, installed, invested, inducted, or placed, had been or were naturally dead."

Sect. 7. "Provided, that no title to confer or present by lapse shall accrue upon any avoidance mentioned in this act, but after six months next after notice given of such avoidance by the ordinary to the patron."

Sect. 8. "And if any incumbent of any benefice with cure of souls shall corruptly resign (*l*) or exchange the same, or corruptly take for or in respect of the resigning or exchanging the same, directly or indirectly, any pension, sum of money, or benefice whatsoever, as well the giver as the taker of any such pension, sum of money, or other benefice corruptly, shall lose double the value of the sum so given, taken, or had; the one moiety as well thereof, as of the forfeiture of the double value of one year's profit before mentioned, to be to the queen, and the other to him that will sue for the same in any of her majesty's courts of record."

This Act not
to affect the
Power of
Ecclesiastical
Court.

Sect. 9. "Provided always, that this act or any thing therein contained, shall not in any wise extend to take away or restrain any punishment, pain or penalty limited, prescribed or inflicted by the laws ecclesiastical, for any the offences before in this act mentioned; but that the same shall remain in force, and may be put in due execution, as it might be before the making of this act; this act or any thing therein contained to the contrary thereof in any wise notwithstanding."

Sect. 10. "And moreover, if any person shall receive or take any money, fee or reward, or any other profit, directly or indirectly, or shall take any promise, agreement, covenant, bond, or other assurance, to receive or have any money, fee, reward, or any other profit, directly or indirectly, either to himself or to any other of his friends (all ordinary and lawful fees only excepted), for or to procure the ordaining or making of any minister (*m*), or giving of any orders, or licence to preach, he shall for every such offence forfeit the sum of 40*l.*, and the party so corruptly ordained or made minister, or taking orders, shall forfeit the sum of 10*l.*; and if at any time within seven years next after such corrupt entering into the ministry or receiving

(*l*) [*Young v. Jones*, E. T. 1782,
4 Bl. Com. 62, ed. Chr. n. 8.]

(*m*) [See too *Kircudbright v. Kircudbright*, 8 Ves. 53.]

of orders, he shall accept or take any benefice, living, or promotion ecclesiastical, then immediately from and after the induction, investing or installation thereof or thereunto had, the same shall be eftsoons merely void, and the patron shall present, collate unto, give and dispose of the same, as if the party so inducted, invested or installed had been naturally dead; the one moiety of all which forfeitures shall be to the queen, and the other to him that will sue in any of her majesty's courts of record." 31 Eliz. c. 6,

S. 4. *For avoiding of Simony.*]—Almost all the authors who have treated of this subject, and even the learned judges in delivering their resolutions in cases of simony, have asserted that there is no word of *simony* in this act; and from thence a conclusion had been drawn in favour of the ecclesiastical jurisdiction, that the temporal courts have nothing to do with simony as such, or to define what shall be deemed simony and what not, but only to take cognizance of the particular corrupt contracts therein specified. Which consequence, although deducible perhaps from other premises, yet doth not follow from the aforesaid observation; for it is plain here is the word simony; and the mistake seemeth to have happened from this short preamble being inadvertently printed at the end of the foregoing section, treating entirely of a different subject, so as to have been overlooked by the first person who made the observation, whom others have followed without examination. Simony is mentioned in this Act.

Donations.]—For the like reason only (as it seemeth), a doubt was made in the case of *Bawderock v. Mackallar* (n), M., 2 Car., whether this statute extendeth to donatives.

S. 5. *If any Person or Persons.*]—If one who hath no right, present by usurpation, and doth it by reason of any corrupt contract or agreement, that presentation and the induction thereupon are hereby void; for this statute extends to all patrons, as well by wrong as by right. In like manner, if when a church is void, the void turn is purchased, although the grant of a void turn, as being a thing in action, is of itself void, and the purchaser's presentee comes in *quasi per usurpationem*; yet because it is by means of a simoniacal contract, it is as much simony as if the grant had not been void (o).

[That the sale of an advowson or of a next presentation, the church being void, is simoniacal, is a confirmed maxim of the common law (p). If a benefice be sold while an action is pending for removing the clerk of a person who has usurped the right of patronage, and such action be successful, the sale is simoniacal, for the church was *never full* of the clerk of the

Sale of next Presentation or Advowson, Church being void.

(n) Cro. Car. 330.

(o) 1 Inst. 120; 3 Inst. 153; Cro. Eliz. 789.

(p) [Per Lord Hardwicke, in *Grey v. Hesketh*, Amb. 268; *Bishop of Lincoln v. Wolferstan*, 1 Bla. Rep. 490; 2 Wils. 174; 3 Burr. 1512; *Leak v.*

Coventry, Cro. Eliz. 611; from which cases it would appear that if a patron sells the fee-simple of an advowson after the avoidance, neither he nor his vendee can have a *quare impedit*. —ED.]

31 Eliz. c. 6.

Case of *Fox v. Bishop of Chester*—Decision of the House of Lords, that as long as the Incumbent is alive, the Sale of the next Presentation to a Layman is valid.

usurper (*q*). But it is always now held, that the sale of the next presentation of a living, the church being full, is valid, except where a clergyman is the purchaser (*r*). It was formerly supposed that if the incumbent be in a *dying* state, the sale was simoniacal (*s*); but the decision of the House of Lords, in the recent case of *Fox v. The Bishop of Chester*, has established that such sale is valid while the incumbent is alive and the church full. Chief Justice Best delivered the opinion of their lordships (reversing that of the Court of King's Bench (*t*)) in this important case (*u*):

[“ My lords, the question which your lordships have been pleased to put to the judges in this case is, ‘ Whether, upon the whole of the matters stated or referred to in the special verdict, the right to present to the rectory or parish church of Wilmslow, upon the death of the Reverend Joseph Bradshaw, was by law vested in Edward Vigor Fox, the plaintiff in error.’ The judges who heard the argument at your lordships’ bar are unanimously of opinion, that upon the whole matters stated or referred to in the special verdict, the right to present to the rectory or parish church of Wilmslow, upon the death of the Reverend Joseph Bradshaw, was by law vested in Edward Vigor Fox, the plaintiff in error.

[“ The patronage of churches was at first yielded by the bishops to the lords of manors who founded or endowed them, and annexed them to the manors in which the churches were situate. By the grant of a manor, the advowson appendant to it passes to the grantee; many of these advowsons have since been severed from the manors to which they were appendant. Although advowsons, when *in gross*, as these which are separated from the manors to which they belonged are called, are a species of spiritual trusts, yet they have been said by Lord Kenyon and other judges to be trusts connected with interests; and they certainly do not lose the temporal character which originally belonged to them, but may be sold either in perpetuity, or for the next or any number of avoidances. If the perpetual advowson be sold when the church is void, the next presentation will not pass; and if the next avoidance only be sold after the death of the incumbent, the sale is altogether void. It may be wise to carry the restraint on the sale of this species of property still further, and to say the next avoidance shall in no case be sold. Undoubtedly much simony is indirectly committed by the sale of next presentations. If it be proper to prevent the giving of money for a presentation, it seems equally proper to prevent the sale of that which gives the immediate right to present. But the courts of law have

(*q*) [*Walker v. Hammersley*, Skin. 90.]

(*r*) [*Vide infra*.]

(*s*) [*Cro. Eliz.* 685; *Smith v. Shelbourn*, Hobart, 165; *Benedict Winch-*

combe v. Bishop of Winchester, Moor, 916; *Smith v. Shelbourn*, 2 W. Bla. 1052; 19 Vin. Ab. 458.]

(*t*) [2 B. & C. 635.]

(*u*) [6 Bing. Rep. 16—22.]

Fox
v.
Bishop of
Chester.

As long as
Incumbent
alive, Sale of
Presentation
to Layman
valid.

never thought that they were authorized to go this length; and even in cases where the purchaser of the next presentation seemed to bring a party nearer to simony than in any other, it was found necessary to have the aid of the legislature to prevent such purchases. A clergyman might buy a next presentation, and present himself before the passing of the statute of the 12 Anne, c. 12. The preamble to the second section of that statute states that 'some of the clergy have procured preferments for themselves by buying ecclesiastical livings.' And then the section provides, that if any one shall either directly or indirectly take or procure the next avoidance for money, reward, gift, profit or benefit, or shall be presented or collated (which words limit the operation of the act to clergymen), that it shall be deemed simoniacal.

[“ It seems to me that if the terms of the statute of Elizabeth could be extended by equity, the case of a clergyman buying a presentation with the intention of presenting himself might have been reached without any other act of parliament. If such a case as that were not within the statute of Elizabeth, the case, on which your lordships have desired our opinion, cannot be affected by that statute. The church, in the present case, was full; no clergyman was privy to the agreement; and the living was not intended by the plaintiff in error, at the time he bought the presentation, for the clerk that he afterwards presented. But I would observe, that persons have recovered who appeared to be dying. The special verdict only states that the incumbent, at the time of the sale, was afflicted with a mortal disease, so that he was then in extreme danger of his life; and his life was thereby greatly despaired of; and that he was so afflicted with such mortal disease, and in extreme danger of his life, and his life was and continued to be greatly despaired of until his death, which happened at half-past eleven at night of the day on which the sale was completed. Many who are afflicted with mortal diseases, and are from such diseases thought to be in imminent danger of dying, live for a considerable time; and the effect of the diseases are sometimes so far suspended, that the persons so afflicted become again capable of performing the duties belonging to their stations in life.

[“ If this conveyance was void, it must have been void at the time it was executed, and would remain void into whatever hands and under whatever circumstances the right of presentation might have passed. Now, if this incumbent had been restored to apparent health, and the vendee had sold the presentation to another person, ignorant of the circumstances under which the first sale was made, it would be most unjust to hold that the second sale was void; and yet this would be the necessary consequence of a decision that the sale was simoniacal. *Whilst the law permits the next presentation of livings to be sold during the lives of the incumbents, as long*

Fox
v.
Bishop of
Chester.
As long as
Incumbent
alive, Sale of
Presentation
to Layman
valid.

as the incumbent is alive the sale is good. Every one who purchases a next presentation contemplates the death of the incumbent. If this contemplation made the sale void, no sale of a next avoidance could be good. *If the death of the incumbent, and the prospect of using the presentation, may be contemplated, the time when the death is to happen cannot be material.*

[“ This case has been compared by the counsel for the defendant in error to those of contemplation of bankruptcy. But a party is not permitted to do an act in contemplation of bankruptcy which is injurious to creditors. A transfer of goods or payment of money in contemplation of bankruptcy, was, before the 6 Geo. 4, void. By that act such a transfer or payment is an act of bankruptcy, because such transactions are direct frauds on the creditors of the bankrupt. But the death of an incumbent may be contemplated, and the purchasing of the next avoidance, in consequence of such contemplation, is no fraud upon any one. The cases, therefore, have no resemblance to each other. The making the legality of the transaction to depend on the state of the incumbent's health would give occasion to much expensive litigation, and, probably, to much false swearing, and would keep churches for a long time void.

[“ The affairs of men are best regulated by broad rules, such as exclude all subtle disputes, all doubtful, unsatisfactory inquiries. *It would be difficult to establish a rule that should settle what degree of probability of the approaching death of an incumbent should prevent the sale of the avoidance of a benefice, and more difficult to ascertain by evidence when an incumbent was within that degree.* I submit to your lordships that the most convenient rule is that which I conceive the law has already established, namely, that *the right to sell the presentation continues as long as the incumbent is in existence.*

[“ The judgment of the court below is, according to the words of the chief justice, ‘ founded on the language of the 31 Eliz. c. 6, and the well-known principle of law, that the provisions of an act of parliament shall not be evaded by shift or contrivance.’ The words of the fifth section of the act are, ‘ If any person shall, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly present or collate any person to any benefice, or give or bestow *the same* for or in respect of any such corrupt cause or consideration.” This clause applies only to the person presenting to the living. If he has received no reward or promise of reward, the presentation is not affected by the terms of the act. The plaintiff in error, who made the presentation, received no reward, nor had any expectation of reward, for making this presentation. I

agree, that if some other person had received a reward for the plaintiff in error, and was to account to him for it,—if the plaintiff in error was not the real purchaser of the avoidance, but the person presented, or some one in his behalf, these and many other things might be considered as frauds on the act, and have avoided the contract. But such things should have been shown by the pleadings, and found by the jury. All that appears on this record is, that the plaintiff in error bought the next avoidance of a living that was full; and that, without any corrupt consideration, he used the right of presentation which he had purchased. All this he had a right to do. There is no circumstance found that shows this is a fraud on the act, unless it be a fraud on the act to buy the presentation to a living which the seller and buyer expect will soon become vacant. Presentations are bought and sold every day with this expectation.

Fox
v.
Bishop of
Chester.
As long as
Incumbent
alive, Sale of
Presentation
to Layman
valid.

[“There is no legal authority to support the judgment of the court, except a short loose note in Winch’s Reports of Hutton, saying what used to be done in Chancery; on the other hand, the case of *Barrett v. Glubb* is directly opposed to the judgment of the Court of King’s Bench. It was thought that case had not the weight of a judicial decision because it was not acted upon. But it was acted upon. Lord Bathurst decreed the conveyance of the advowson which included the next presentation, and gave the purchaser and his clerk their costs. The seller must have acquiesced in this decision, or he would have prosecuted his *quare impedit*; and if the Common Pleas had retained the opinion that they had certified to the chancellor, he might have carried it by bill of exceptions to the King’s Bench. When the chancellor decreed a conveyance, without doubt it was such a conveyance as gave the purchaser a legal title from a time before the death of the incumbent, by making the assignment take effect from the date of the contract to assign; there was, therefore, no occasion for any injunction, as was supposed by the King’s Bench. The question, by the conveyance decreed, was fairly raised for another court of law, if the party had not completely acquiesced in the judgment of the Common Pleas, confirmed by that of the chancellor. There are no other cases in the books which bear much on the question proposed to us by your lordships. For the reasons given in support of the judges’ answer to that question I only am responsible.”—ED.]

And it is to be observed, that the clause is general, “If *any* person or persons,” and doth make no allowance in the case of father and son, more than in the case of other persons; and that, therefore, the notion that a purchase of the next avoidance when the incumbent is sick and ready to die, and the son’s privity to that purchase, is less simony in the case of a son than it would be in the case of any other person, hath no foundation in the act. Neither is the reason, that a father is

bound by nature to provide for his son, good to the aforesaid purpose; for a man is bound by nature also to provide for himself, and so might as well purchase for himself (*x*).

So if a father, in consideration of a clerk's marrying his daughter, doth covenant with the clerk's father, that he will procure the clerk to be presented, admitted, instituted, and inducted into such a church upon the next avoidance thereof; this is a simoniacal contract (*y*); otherwise, if the covenant is independent of the consideration (*z*).

Directly or indirectly.—Simony may be committed, and yet neither the patron nor the incumbent be privy to it, or knowing of it. Thus in a writ of error to reverse a judgment, whereby the king had recovered in a *quare impedit*, upon a title of simony, which was, that a friend of the patron had agreed to give so much money to one (who was not the patron), to procure the said person to be presented, who was presented according to that agreement; it was assigned for error, that it did not appear that either patron or parson were knowing of this agreement. But by the court, the parson was simoniacally promoted; and a case was mentioned, where the parson of St. Clement's was ousted, by reason that a friend had given money to a page belonging to the Earl of Exeter, to endeavour to procure the presentation, and neither the earl nor the parson knew anything of it (*a*).

2. Resignation Bonds, before and since the 9 Geo. 4, c. 94.

31 Eliz. c. 6.
Construction
of, as to Re-
signation
Bonds.

[It has been seen that the 31 Eliz. c. 6, s. 5, renders void the presentation or collation to a living for any "*bond, covenant or other assurance of or for any sum of money, reward, gift, profit, or benefit whatsoever.*"] The bond and assurance here mentioned is for *money, reward, gift, profit, or benefit*; [for instance, a promise of the presentee to his patron to forbear trying a suit for tithes (*b*); so also a covenant to marry a particular person (*c*); any transaction of this kind constitutes a corrupt and simoniacal bargain, the nature of which cannot be altered by the intention of the contracting party to make an innocent or praiseworthy use of a contract in its essence illegal (*d*).—ED.] But a way was found very early to defeat the intention of this act, by *general bonds of resignation*, whereby the presentee obliged himself to resign and void the benefice, within a certain time after warning to be given to him, or else indefinitely, whenever the patron should require it (*e*).

(*x*) Wats. c. 5; Gibs. 798; see 2 Bla. Com. 280.

(*y*) Wats. c. 5; Litt. Rep. 177.

(*z*) *Byrte v. Manning*, Cro. Car. 425.

(*a*) Wats. c. 5; *Rex v. Trussel*, 1 Siderf. 329; 2 Keb. 204; [Cro. Eliz. 789; Comyn's Digest, title *Eglise*; 1

Brownl. 153; 3 Lev. 337: *quare aliter* as to advowsons in fee, *Basset v. Glubb*, 2 Blac. R. 1052; Ambler, 268].

(*b*) [*Rex v. Bishop of Oxford*, 7 East, 600.]

(*c*) [Cro. Car. 425; Degge, 47.]

(*d*) [2 B. & C. 659.]

(*e*) Gibs. 799, 800.

And these bonds have been allowed both in law and equity: thus in the case of *Peele v. The Earl of Carlisle*, M., 6 Geo. 1, in the King's Bench (*f*), in an action of debt upon a bond, conditioned to resign a benefice, the court refused to let the defendant's counsel argue the validity of such bonds, they having been so often established even in a court of equity; and that also, where the condition is general, and not barely to resign to a particular person.

So M., 9 Geo. 1, in the Chancery, *Peele v. Capel* (*g*). Capel on presenting Peele to a living, took a bond from him to resign when the patron's nephew came of age, for whom the living was designed. When the nephew was of age, instead of requiring a resignation, it was agreed between them all, that Peele should continue to hold the living, paying 30*l.* a-year to the nephew. Peele makes the payment for seven years, but refusing to pay any more, the patron puts the bond in suit: and then Peele comes into this court for an injunction, and to have back his 30*l.* a-year. On hearing, the Lord Chancellor granted the injunction, not (as he said) upon account of any defect in the bond itself, which he held good, but on account of the ill use that had been made of it; and as to the money, it being paid upon a simoniacal contract, he left the plaintiff to go to law for it.

So in the case of *Durston v. Sandys*, M., 1686 (*h*), the defendant, upon his presenting the plaintiff to a parsonage, took a bond of him to resign: which (as the reporter says) though in itself lawful, yet the patron making an ill use of it, viz. to prevent the incumbent from demanding tithes in kind, the court awarded a perpetual injunction against the bond.

And in the case of *Hesket v. Grey*, in the King's Bench, H., 28 Geo. 2, which was a case out of Chancery: — Debt upon a bond. Upon oyer of the condition, it appeared that the obligor had been presented to the living of Staining by the obligee, and had agreed to deliver it up into the hands of the ordinary, within three months after the expiration of five years, at the request of the plaintiff, his heirs or assigns, or upon proper notice in writing, so that a new presentation might be made. And after this recital of the agreement, the condition was, that if the defendant did deliver up into the hands of the ordinary the said living, so as that the same might become void, then the obligation to be void. The defendant pleaded, that he did offer to resign absolutely the living, and that he delivered the resignation to the ordinary that he might accept the same, and the plaintiff make a new presentation, but that the ordinary refused to accept it. He pleaded further, that the agreement was corrupt; and that the bond was taken to keep the defendant in awe, and therefore also corrupt and void.

(*f*) Str. 227.

(*g*) Str. 534.

(*h*) 1 Vern. 411.

Resignation
Bonds.
Hesket
v.
Grey.

Ryder, Chief Justice, delivered the resolution of the court: The averring in the plea, that the agreement was corrupt, will not make it so; but it should set forth what sort of corruption, that the court may judge whether simoniacal or not. As to the point, whether a general bond of resignation is good, we are all of opinion it is. It was determined in the case of *Lord Carlisle v. Peele*. But every simoniacal contract is void, where it is secured only by promise. Otherwise it is when a bond is given for the performance of such a contract, when the condition does not express the agreement, but is only a condition for payment of money, because we cannot go out of the written condition to vacate the obligation, and also because a specialty does not want a consideration to support it, as a promise depending only upon simple contract does. It has been objected, that these kinds of bonds, when the contract appears upon the face of the condition to be for a general resignation upon request, are void: indeed, it does look so; but the law is otherwise. And as to the other objection, we are all of opinion that the plea in bar is bad, because it is not averred that the bishop has accepted this resignation, and for these reasons: 1. Because, without the acceptance of the ordinary, the resignation is not complete, and the patron can have no benefit of such a resignation. 2. Because the defendant has undertaken for the acceptance of the bishop, as that is necessary to make a complete resignation, which he has by the condition of his bond agreed to do. 3. Because the plea does not contain a sufficient excuse for the bishop's non-acceptance of the resignation; for the defendant has undertaken that the bishop shall do it, or if he does not he will make a satisfaction by paying money or the like to the party who is injured thereby; and this is reasonable, and is the law in such cases, when the obligor undertakes for the act of a stranger. The ordinary is a judicial officer, and is intrusted with a judicial power to accept or refuse resignations as he thinks proper. And judgment was given for the plaintiff. But it appearing that the patron had advertised the living to be sold, and in treating with a purchaser for it, that he had declared he asked and expected a greater price for it, as he could compel an immediate resignation; Lord Hardwicke, for this reason, and as it was making a bad use of the patron, granted an injunction to restrain the patron from proceeding further upon the bond.

Grey afterwards applied to the Court of Chancery for an injunction. The proceedings are thus reported (i): Plaintiff was presented to the living of Steyning by the defendant, and previous thereto gave a general bond of resignation after the end of six years, on three months' request: action sued at law, and judgment recovered on the bond. Bill by plaintiff for an

(i) *Grey v. Hesketh*, Ambler, 268.

injunction, and *inter alia* for a discovery whether defendant had not sold the advowson since the end of the six years, with a promise of procuring an immediate resignation. Defendant demurred to the discovery, as tending to subject him to the penalties of the statute against simony. Lord Hardwicke, C. was of opinion that the sale of an advowson during a vacancy is not within the statute of simony as sale of the next presentation is (*k*); but it is void by the common law. These sorts of bonds are held good at law, and so they are in equity, unless an ill use is attempted to be made of them, in which case this court will interfere (*l*). The question then is, whether the sale of his advowson under these circumstances, attended with an immediate resignation, is an abuse? It seems to be an evasion of the statute: perhaps if more money had been given by reason of the vacancy, it might be within the statute. It desires discovery; and he overruled the demurrer. It was suggested in the bill, and made a defence at law, that the bishop had refused to accept the resignation. His lordship approved the conduct of the bishop in case he was informed the advowson was sold to be attended with an immediate resignation. And he also expressed himself of the same opinion with the judges in the King's Bench, that the bishop's refusal to accept the resignation was no excuse for the incumbent's not resigning; for that he had undertaken to resign, which implies both resignation and acceptance, without which the resignation is not complete (*m*).

In the case of *The Bishop of London v. Lewis Disney Ffytche*, esquire, in the year 1780, the rectory of the parish church of Woodham Walter in Essex, in the diocese of London, becoming vacant, Mr. Ffytche presented his clerk, the Reverend John Eyre, to the bishop for institution. The bishop being informed that the said John Eyre had given his patron a bond in a large penalty to resign the said rectory at any time upon his request, and the said John Eyre acknowledging that he had given such a bond, the bishop refused to institute him to the living.

*Ffytche's
Case.*

Whereupon Mr. Ffytche brought a *quare impedit* (*n*) against the bishop in the Court of Common Pleas, and obtained judgment against him. Upon which the bishop appealed to the Court of King's Bench, and that court also gave judgment in affirmance of the judgment in the Court of Common Pleas. Upon this the bishop appealed to the House of Lords; where,

(*k*) See Cro. Eliz. 788; Moore, 914.

(*l*) 1 Vern. 411.

(*m*) *Lamb's case*, 5 Co.

(*n*) Upon this *quare impedit* the bishop filed a bill to discover whether the clerk presented to him by Mr. Ffytche had not given a general bond of resignation, in order to set up that

bond as a defence at law for having refused him institution. To this bill the defendant demurred; 1st, on account of the legality of such bond; 2nd, that the discovery was immaterial; but the demurrer was overruled. 1 Bro. 96.

Resignation
Bonds.
Ffytche's
Case.

upon debate, the lords ordered several questions to be put to the judges; who differing in opinion, they were directed to deliver their opinions *seriatim*, with their reasons. The questions were twelve in number; but divers of them going only to matter of form, the true substantial inquiry was, whether an agreement made between an incumbent and patron, whereby the incumbent undertakes to avoid the benefice at the request of the patron, be not an agreement for a benefit to the said patron within the statute of 31 Eliz., so as by reason of such agreement such presentation shall be void?

Mr. Justice Buller said he had taken no small pains to find out upon what principle all the cases have gone, but it had not been with much effect; for he could not find that the different authorities upon this subject are supported by that sense, by that reason, or by that principle which, if the case were now totally new, would govern him in his judgment, or induce him to concur in those decisions. But the authorities are so very numerous; they have arisen at so many different periods of time; all the judges for near two hundred years past have been so uniformly of the same opinion; the law has been received not only in Westminster Hall, but throughout the kingdom, as properly settled; and mankind have so uniformly acted upon this idea, that it seemed to him to be very dangerous to overturn or even to shake those authorities; for if policy, private wishes, or the hardships of a case, were permitted to weigh down judicial determinations in one instance, they might be extended to any other; and the law, instead of being a certain rule, would be governed by a discretion to be exercised without rule in each particular case which comes in judgment. The bond in question is a bond with a condition to resign upon request; and it is stated in the pleadings that it was corruptly agreed between Mr. Eyre and Mr. Ffytche, that Mr. Ffytche should present Mr. Eyre, and in consequence thereof Mr. Eyre did give this bond to Mr. Ffytche. The question is, whether such a bond be corrupt and illegal? The authorities one and all have determined that such a bond is good; and this hath been decided not only in cases where it might be supposed that the bond was given *after* the presentation, and without any *previous* agreement, but in cases where it did appear that the bond was given *before* the presentation, and that a presentation was made in consideration of that bond.

Mr. Baron Eyre.—“The counsel for Mr. Ffytche rested the whole argument upon the authority of a series of cases, in which it was said to have been adjudged that these bonds were good in law; the House was called upon *stare super antiquas vias*, and an indignation endeavoured to be raised against all those who should unsettle foundations. But without unsettling foundations, he might ask, he said, how the general doctrine, extracted from this series of cases, that a general bond of

resignation is in itself not unlawful, applies even to prove that the bond stated in these pleadings, under the special circumstances of this case, is not unlawful? And he was compelled to go into the inquiry, because the question upon these bonds, proposed by their lordships, was not any question upon the validity of such bonds themselves, but was a question upon their validity upon the particular case, and under special circumstances stated in these pleadings. He had looked, he said, into most of the cases that have been alluded to, and found that instead of deciding the question upon the validity of such a bond, given under such circumstances as are disclosed in these pleadings, they are express authorities to prove that such a question remains to this hour open to discussion. From the uniform language of the cases, if you object to the validity of these bonds, you must take the circumstances upon which the objection is founded, that the court may judge whether it is sufficient. Therefore, at once to distinguish this case from all the cases cited, he believed he might hazard the assertion, viz. that all the circumstances were stated for the first time upon this record. Laying these, therefore, out of the case, the questions proposed to the judges are by no means complicated or entangled. The statute of Elizabeth was made to enforce a very clear rule in the ecclesiastical law, that presentations ought to be spontaneous. The words of the statute are "*reward, gift, profit, or benefit.*" Is the possession of a resignation bond *profit* or *benefit* to a patron? In every article in which the patronage is valuable it is marketable, and by that the bond becomes instantly more valuable and more marketable. In a word, he that stipulates for a resignation bond, bargains for a sum of money, or for that which to him is as valuable, or perhaps more valuable than that sum of money. Either of them is *beneficial* to him, both of them therefore equally forbidden by the statute."

Mr. Justice Nares.—"It may perhaps be difficult to point out the reasons upon which general bonds of resignation were originally held good. Many reasons may be suggested; among the rest he mentioned that such a bond was never considered in a criminal point of view where particular persons, as the sons or relations or particular friends, were intended to be promoted upon a resignation. He would suppose that the patron, at the time he gave his living to the incumbent, had a great number of children, one perhaps he intended to bring up to the church: they were of that age at that time, he could not tell which it may be that may live to be old enough, or if he lived, how far his capacity might enable him to take upon him that sacred function; and there may be other things to prevent it; and therefore it is impossible to specify what particular child it should be assigned to. If he has in his eye a relation among others, he cannot perhaps point out that

Resignation
Bonds.
Ffytche's
Case.

particular relation. Or there may be other incidents; the incumbent might go and leave his church for too long a time, therefore resignation bonds may be considered as having some little foundation at the time they were originally entered into. But that such bonds have been held good appears from a regular train of cases in law and equity for near two hundred years. Founded on which decisions, which have so totally settled this point in the temporal courts, Sir Simon Degge takes notice that bonds of resignation had become so frequent that hardly a living was possessed without them, that he advises an application to parliament to prevent that bad practice, and which he believed, if it could be effectually prevented, would be a very desirable thing."

The Bishop of Salisbury.—"The whole of the question rests ultimately on the statute of 31 Eliz. The interpretation given to that statute by the learned baron is consonant to the best and most dispassionate opinion I am capable of forming; and which therefore I hold myself bound to deliver to your lordships. It is well known, my lords, that this act was passed with a view of protecting the ecclesiastical law, and of strengthening its weakness. The ecclesiastical law, which considers simony as a crime of deep dye, could only punish the *clerical* offender. The legislature, perceiving the serious consequences of this defect, in its wisdom interposed, and inflicted certain penalties on the patron, the corrupter and partaker of the guilt. The act is not deprivative, but accumulative. It doth not deprive the ecclesiastical judge of his power. It doth not withdraw the clerk from the jurisdiction of his ordinary, nor dispense with the oath against simony, to which every presentee was previously subject. Its main object was to prevent corrupt influence, interested motives, and gross abuse of his power on the part of the patron; and to apply a remedy to an evil thought to be of the most dangerous frequency, of the most alarming magnitude at that day; which has been continually increasing to the present period; and which, unless checked, bids fair to break down every barrier which honour, decency, and religion can oppose. The question on which your lordships are now to pass judgment, I conceive to be new in specie. It is here, my lords, I mean to make my stand. None of the various cases which have been adduced by the judges in the House, or by the counsel at the bar, seem to me to touch it. They are distinct in their nature; the case has never been decided upon, never been argued, and consequently all the reasoning from a series of determinations in the courts below, so much laboured, and so much pressed, doth not apply, and falls to the ground. Much has been said, my lords, much more probably will be said, as to the inexpediency and fatal effects of moving old foundations. Legal decisions, which for centuries have received the sanction of successive generations,

of the great and able interpreters of law which preside in our courts (and greater and abler either in former ages, or at the present time, no nation ever had to boast of) are entitled to the highest reverence, from ever citizen who respects his own character, values his property, or loves his country. But I contend, my lords, that in the case before you there are no precedents. It is specific in its circumstances; and (exclusive of the bond), on the sole ground of the statute, the presentation in the present case is void. And here, my lords, I should naturally close what I have to offer to your lordships' consideration. But as the situation of the parochial clergy, on the foot of the commonly received interpretation of the law relative to general bonds of resignation, is either unknown or misunderstood, I should be wanting in justice to that most useful and most respectable body of men, were I not to represent it without exaggeration, and leave it to your lordships' honour and humanity. Every presentee, previous to his receiving institution, is obliged to take the oath against simony. The sense of that oath is as clear as language can make it. There never could have been the hesitation of an instant as to its meaning, in the breast of any man, who in interpreting the terms in which it is expressed, followed nothing but the genuine suggestions of his own understanding. The only question which can arise on the subject is a question of conscience alone; but unhappily, the force of temptation in this as in other instances of moral conduct, operate on minds not sufficiently tender to the impressions of duty; and leads to the fostering a secret wish, that the imposition of the oath could be either dispensed with, or the terms in which it is framed be differently expounded from its obvious import. The surprise of an unexpected offer of a valuable benefice; the oppression of poverty; the calls, perhaps, of a numerous family unprovided for; and the glitter of comparative affluence; all contribute to induce to the listening to any casuistry which can reconcile interest with duty. To a man thus circumstanced, and thus inclined, authority is easily admitted in the place of reasoning, and the sanction of courts supersedes conviction. From these motives, general bonds of resignation have usually been given; and from the instant they are given, the wretched presentee is taken from under the protection of that law which guards the property of every other subject of the state. He ceases to be free, because he holds his living at the absolute will of his patron, subject to his caprice, and rendered incapable of discharging many of the most essential duties of his office, where they happen to clash with the prejudices, the humours, or the vices of the master of his fortune. Nay, my lords, even the most degrading compliances, the sacrifice of every comfort which unconditional presentation confers, are insufficient to secure a permanent continuance in the benefice,

Resignation
Bonds.
Ffytche's
Case.

the instant that the wants, or even the whim, of the patron demand an avoidance. Resignation or ruin is the alternative. Your lordships need not be told which is likely to be submitted to."

Bishop of Bangor.—"I had occasion, many years ago in the course of my inquiries, to consider the subject of general bonds of resignation. And I must confess that the decisions, one in the 8 James 1, *Jones v. Lawrence*, the other in the 5 Charles 1, *Babington v. Wood*, did not appear to me to rest on such solid and substantial grounds as they ought to have done; and yet these two determinations are the precedents, which our courts have ever since implicitly followed, whenever the legality of such bonds was brought into question. One of the learned judges, in the course of his argument, proved to your lordships, that the point now under consideration was not the point in question when these two cases were determined, on which so much stress was laid in the courts below; and it is very material that all the learned judges who have hitherto delivered their opinions to you on this occasion have unanimously declared, that if this case had been *res integra*, the judgment ought to have been different; but the weight of these precedents, and of many others for so great a length of time, presses so hard upon them, that they are unwilling to make any alteration, lest they should be considered as removing land marks, and unsettling principles which had prevailed for near two centuries. Much reverence, my lords, is certainly due to such decisions of our courts as have been uniform and long acquiesced in; but if in succeeding times, great and manifold inconveniences shall be found to arise from persisting in such determinations, and no inconvenience from altering them, the case is too plain for me to tell this House what ought to be done. Under the cover of general bonds of resignation, the worst and most corrupt practices may be carried on. By means of such a bond, a patron may erect a court of justice over his clerk, much superior to that of his ordinary; the ordinary can suspend a clerk from the exercise of his function, and can deprive him of his benefice; but before this can be done, the party must be cited to appear; a charge commonly called a libel must be exhibited against him; a competent time must be allowed for answering the charge; a liberty must be granted for counsel to defend the cause; and after hearing all the proofs, a solemn sentence must be pronounced, from which there lies an appeal. But a patron, with such a bond in his pocket, has a much more compendious way of doing his business; for he can deprive his clerk, without trial, without proof, without sentence. By means of these bonds, patrons can convert benefices, which are by law freeholds for life, into estates for years, for months, or even only for a few days. By means of these

bonds, the revenues of that most useful and respectable body, the parochial clergy, are growing less and less, every year; and there is little doubt, but that many of the money payments, in lieu of tithes, and which have now obtained the form of a modus, sprang originally from these bonds. By means of these bonds, it is become as easy to sell the next avoidance of a rectory or vicarage as it is to sell any other species of property; and from this circumstance, religion, learning, discipline, and good order suffer very much. It has been common of late years to advertise in the public prints the sale of livings with immediate resignation; but if this judgment should have the sanction of this House, these advertisers would wax bolder, and in a short time inform us of public offices being opened for negociating this kind of traffic."

Bishop of Landaff.—"The pope, in former ages, was a great encourager of resignations among the clergy of this kingdom, because he obtained a year's income of the benefice upon every avoidance; but neither were the Catholic clergy of this country at that time, nor are they (he believed) at this time, fettered by general bonds of resignation. In the Church of Scotland, this traffic hath not yet polluted the minds of either patrons or ministers; nor is it in use in any Protestant Church in Christendom, at least not in the same degree in which it is in our own. This practice, he said, was a sore scandal to the Church of England; and he hoped, from the high sense of religion and honour which had accompanied the deliberations of that House, that the time was now come when it would be no longer endured. It is said, that this matter is not now *res integra*; that there have been, in the course of above two hundred years, many adjudged cases, and that we must of necessity adhere to the precedents. The *stare decisis*, the *stare supra antiquas vias*, was a maxim of law sanctified by such length of usage, such weight of authority, that he durst not produce any of the arguments which suggested themselves to his mind in opposition to it, though some of them tended to question its utility, and some of them its justice. It was a maxim, he said, which his hitherto course of studies had not brought him much acquainted with. It is not admitted in philosophy; it is not admitted in divinity, for divines do not allow that there are any infallible interpreters of the Bible, which is their statute-book; they maintain that fathers, churches, and councils, have erred in their interpretations of that book, in their decisions concerning points of faith; this, as Protestants, they ever must maintain, otherwise they cannot justify the principles on which they emancipated themselves from the bondage of the Church of Rome. But be it so, let this maxim, as applied to the law, be admitted in its fullest extent, what follows? Nothing in this case, he said, for the plaintiff had averred, and one of the learned judges had been pointed in proving, that the case in question

Resignation
Bonds.
Ffytche's
Case.

was not similar to any one of the cases which had been adjudged in the courts below. But suppose the case of the plaintiff is similar, in all its circumstances, to some one or more of the cases which have been adjudged below; still it will not follow, that the House of Lords is to be bound by the precedents of those courts; if it is, the right of appeal is nugatory. If a man thinks that the judgment of those courts is contrary to law, he has a right to come to this House to know whether it be so or not. And this House, in delivering its opinion, doth not make law, but declares what the law is. The courts below interpret a statute one way, this House may see reason to interpret it another; and in that case the constitution hath said, that the courts below mistook the sense of the statute, and that the interpretation which it receives in this House is the right interpretation. Precedents may be obligatory in the courts in which they are established; but their operation should not be extended beyond the limits of those courts. It ought not at least to be extended into the House of Lords. If indeed there were any precedents of that House concerning the legality or illegality of general bonds of resignation, those precedents would have deserved weight in the present case, but there is not one precedent of the kind to be met with on their journals; so that whatever might be thought as to the novelty of the case in the courts below, it was undoubtedly new in that House, free and unshackled by precedent."

Lord Thurlow argued at large against the validity of these bonds, and among other particulars observed, that one thing which struck him was, that ever since the establishment of the Church of England, this ecclesiastical office was an office *for* life. It is not competent to the bishop to give it for any less time than for life. And it never was competent to a bishop of any European Church that ever he heard of (and he had made inquiries) to give it for any less estate than an estate for life. The incumbent therefore derives entirely under and from the bishop an estate for life, grounded upon the original constitution of the office, and consequently invariable by law. If that be the constitution of the office, by what rule or principle can it be justified at common law, that such an officer should give a bond to his patron in order to hold the living for a less term than for life. In the argument of this cause, a question was asked, with respect to a bond given by a *judge* to resign his office of judge: what was the answer? The bond would be given to the king; and if given to the king, it would be void, because it would render the judges dependent upon the king, instead of being independent, as the statute of King William expresses it, *quamdiu se bene gesserint*. A *Master in Chancery* is an officer appointed for life: suppose the Chancellor has the appointment of it; suppose such Master gives a bond to resign when called upon, would that bond be good at common law?

Resignation
Bonds.
Ffytche's
Case.

No; because it is not only contrary to the constitution of his office, but because the public has an interest in the independence of that officer, as being appointed for life, and a public law officer; his place is independent, it is whilst he behaves himself well in that office; if he is an officer for life, how can any private man whatsoever, because it is his province to appoint him, take upon him to render that officer's situation such as the law said it should not be. And in the conclusion he moved, that the judgments of the Courts of Common Pleas and King's Bench in this cause be reversed. Which was determined accordingly, upon a division, nineteen against eighteen. From the printed case, by Thomas Cunningham, Esq.

N. One of the questions proposed to the judges was, whether the ordinary is bound to accept a resignation? To which the answer of most of them was, that this being an entire new case, and not made a question of in the courts below, nor ever argued at their lordships' bar, they begged leave for the present to decline answering it (*o*).

Since this case, a bond given to the patron by an incumbent on presentation to reside on the living, or to resign to the ordinary, if he did not return to it within one month after notice, and also not to commit waste, was adjudged to be good; for the condition was not, as in *Ffytche's* case, to secure an unqualified resignation, but to enforce the performance of moral, legal, and religious duties (*p*). And in a subsequent case, the condition of a bond appearing to be to reside, to keep the buildings on the living in repair, and to resign after one month's notice, in order that the patron's son, a youth of fourteen years of age, might be presented to the benefice, it was declared by the Court of King's Bench to be legal, without argument; this case not being precisely similar to *Ffytche's*, and the court understanding that both parties intended to appeal to the House of Lords (*q*). But the case does not appear to have gone further. Yet if the bond is general for resignation, some special reason must be shown to require a resignation, or the Court of Chancery will not suffer it to be put in suit: for otherwise, simony would be committed without the possibility of proof or punishment (*r*).

[The decision in *Ffytche's* case was however only considered to have established the illegality of *general* resignation bonds, and it was still supposed that bonds in favour of specified persons were legal. This doctrine was however completely overthrown by the decision of the House of Lords in *Fletcher v. Sondes*, which reversed that of the Court of Queen's Bench (*s*). All the judges, with the exception of Bayley, J., Holroyd, J.,

Fletcher
v.
Lord Sondes.

(*o*) *Vide ante*, tit. *Resignation*.

(*p*) *Bagshaw v. Bossley*, 4 T. R. 78.

(*q*) *Partridge v. Whiston*, 4 T. R.

(*r*) *Treat. of Eq. by Fonb.* 220,

221, with the cases there cited.

(*s*) [5 B. & A. 335.]

Resignation
Bonds.

Fletcher

v.

Lord Sondes.

A Bond for
resigning a
Living in
favour of one
of two Bro-
thers of the
Patron, is
void.

and Littledale, J., delivered their opinions at length: three (Best, C. J., Burrough and Gaselee, Js.) held the bond illegal; six (Abbott, C. J., Alexander, C. B., Graham, B., Parke, J., Garrow, B., Hullock, B.) and the Lord Chancellor (Eldon) held a contrary opinion. The cause was heard on the 1st and 2nd of May, 1826, and on Monday April 9, 1827, the decision of the House of Lords was delivered by the Lord Chancellor as follows (t):

[“ Having gone through all the circumstances of the case, he said, the question now for the consideration of their lordships was, whether this was a bond on which the party was entitled to sue; and in coming to a conclusion on this subject their lordships should consider themselves as judges in a court of justice, and his duty was not to state the case on any other ground than that which was warranted by law. He had not the slightest hesitation in saying, that before the decision given in the case of *The Bishop of London v. Ffytche*, this bond would have been held legal, but he was of opinion that it came within the principle which governed that decision. It had been argued by counsel at the bar that this bond could not be considered simoniacal, as the condition of the resignation was the presentation of a particular person, and that the obligee might see, and the bishop take care that on the resignation, no other person should be presented but the Rev. Henry Watson, the brother of Lord Sondes. Now, if the resignation were conditional, it would cease to be a resignation at all, and after an incumbent had resigned, was there any law upon earth which could compel a patron to present any particular person? It had already been decided in several instances, that a resignation, to be good, must be *purè et absque conditione*, otherwise the law said it was no resignation, or it was void. True it was, that two or three eminent persons were adverse to the decision in the case of *The Bishop of London v. Ffytche*, among whom was Lord Kenyon, to whose opinion in legal matters he paid the highest respect, and it was consequently urged, that that decision should govern no other case except such as was strictly in point, but his lordship thought that there was nothing in the present case which should take it out of the rule by which that decision was governed. *The Bishop of London v. Ffytche*, was a bond of general resignation, and if the incumbent resigned in the present case, could not the patron present whom he pleased? How then did it differ from a bond of general resignation? It had been urged, that if this bond should be judged simoniacal, the incumbent and the patron would be subject to heavy penalties, but it was their lordships’ business not to attend to any thing but to the subject proposed for their consideration. How could they with propriety pronounce against the law to avoid the consequences

(t) [3 Bing. Rep. 598.]

of an illegal act? When he looked to the cases in the books, which were advanced in support of this judgment, he should say they were not well considered. One of them said, that a bond of resignation might be made in favour of a brother; another said in favour of a cousin or a near relation. But he would ask, what had the condition or relationship of the person in whose favour the bond was made to do with the question? That ought to be left out of consideration. Could a patron take a bond in favour of himself? If not, he could not take it in favour of any man on account of relationship, for no man is more nearly related to a patron than himself; and, if he could take such a bond, it would in construction of law be the same as a general bond of resignation, for it was evident he could present whom he pleased after. But, again, it was said, that it could not be held simoniacal, unless it appeared that some benefit could be derived from it. Might not such a bond be made covertly in consideration of money, in this manner;—when the time for resignation arrived, the patron might say to the clergyman, ‘If you pay me a certain sum of money, I will allow you to hold your living longer.’ Could not such a thing be easily effected? He had no doubt but that this decision would come by surprise, and bear harshly on many patrons and clergymen, but he was not one of those who would hesitate to indemnify those who had hitherto committed themselves by such bonds, whether patrons or incumbents, provided that were done without touching on the general principles of the ecclesiastical laws of the country, some of which, it should be admitted, were severe. On the grounds before mentioned, he did not see how he could do otherwise than adjudge this a simoniacal contract: now, therefore, after the most profound consideration, he would move their lordships, that the judgment in the court below be reversed.

Resignation
Bonds.
Fletcher
v.
Lord Sondes.

[“Judgment reversed accordingly.

[“The Archbishop of Canterbury entirely concurred in the opinion of the lord chancellor, which was agreeable to that of the majority of the judges; but he had to implore their lordships’ attention to this circumstance, that a large number, both of patrons and incumbents, had exposed themselves to severe penalties. His grace trusted, that, however erroneously they had thus committed themselves, that House would afford them protection. He held in his hands a bill containing such restrictions as would protect bonds of this nature heretofore made, and exempt the parties from the penalties above alluded to; with their lordships’ permission he would move that it should be now read *pro formâ*, and on the second reading he would explain its provisions.”

[This bill became the 7 & 8 Geo. 4, c. 25, which enacted, that no presentation to any spiritual office made before 9th of April, 1827, shall be void on account of any agreement to

Resignation
Bonds.

resign when another person specially named shall become qualified to take the same; that persons making such agreement should not be subject to any penalty on account thereof, and that all such made before 9th April, 1827, should be valid and effectual in law. The object of this act was strictly retrospective, but in the following year (28th of July, 1828) the statute of 9 Geo. 4, c. 94, was passed, intituled "An Act for rendering valid Bonds, Covenants, and other Assurances for the Resignation of Ecclesiastical Preferments, in certain specified Cases;" it governs all future transactions of this description:—

9 Geo. 4,
c. 94.

Engagements
entered into
for the Re-
signation of
any Benefice
upon Notice
or Request to
be valid.

[“ ‘Whereas it is expedient that certain bonds, covenants, and other assurances for the resignation of ecclesiastical preferments, should be rendered valid in the cases and subject to the limitations hereinafter specified;’ Be it enacted, &c., That every engagement by promise, grant, agreement, or covenant, which shall be really and *bonâ fide* made, given, or entered into at any time after the passing of this act, for the resignation of any spiritual office, being a benefice with cure of souls, dignity, prebend, or living ecclesiastical, to the intent or purpose, to be manifested by the terms of such engagement, that any one person whosoever, to be specially named and described therein, or one or two persons to be specially named and described therein, being such persons as are hereinafter mentioned, shall be presented, collated, nominated, or appointed to such spiritual office, or that the same shall be given or bestowed to or upon him, shall be good, valid, and effectual in the law to all intents and purposes whatsoever, and the performance of the same may also be enforced in equity: Provided always, that such engagement shall be so entered into before the presentation, nomination, collation, or appointment of the party so entering into the same as aforesaid.”]

Proviso.

Relationship
of such Per-
sons.

[Sect. 2. “Provided always, that where two persons shall be so specially named and described in such engagement, each of them shall be, either by blood or marriage, an uncle, son, grandson, brother, nephew, or grand nephew of the patron or of one of the patrons of such spiritual office, not being merely a trustee or trustees of the patronage of the same, or of the person or one of the persons for whom the patron or patrons shall be a trustee or trustees, or of the person or one of the persons by whose direction such presentation, collation, gift, or bestowing shall be intended to be made, or of any married woman whose husband in her right shall be the patron or one of the patrons of such spiritual office, or of any other person in whose right such presentation, collation, gift, or bestowing shall be intended to be made.”]

No Presenta-
tion to any
Spiritual
Office shall
be void by
reason of
such Agree-
ment to re-
sign.

[Sect. 3. “That no presentation, collation, gift, or bestowing to or of any such spiritual office of or upon any spiritual person, to be made after the passing of this act, nor any admission, institution, investiture, or induction thereupon, shall be void, frustrate, or of no effect in law for or by reason of any such engagement so to be made, given, or entered into by such spiritual person, or any other person or persons, to or with the patron or patrons of such spiritual office, or to or with any other person or persons, for the resignation of the same as aforesaid; and that it shall not be lawful for the

king's most excellent majesty, his heir or successors, for or by reason of any such engagements as aforesaid, to present or collate unto, or give or bestow such spiritual office; and that such spiritual person, and patron or patrons, or other person or persons respectively, shall not be liable to any pains, penalty, forfeitures, loss, or disability, nor to any prosecution or other proceeding, civil, criminal, or penal, in any court, ecclesiastical or temporal, for or by reason of his, her, or their having made, given, or entered into, or accepted or taken such engagement as aforesaid; and that every such presentation or collation, or gift or bestowing, to be made after the passing of this act, and every admission, institution, investiture, and induction thereupon, shall be as valid and effectual in the law to all intents and purposes whatsoever as if such engagement had not been made, given, or entered into, or accepted or taken; any thing in an act passed in the thirty-first year of the reign of her late majesty Queen Elizabeth, intituled 'An Act against Abuses in Elections of Scholars and Presentations to Benefices,' or in any other act, statute, or canon, or any law, to the contrary in anywise notwithstanding."

Resignation Bonds.

Persons making such Agreement not to be liable to Penalty.

Such Presentations to be valid.

31 Eliz. c. 6.

[Sect. 4. "Provided always, that nothing in this act shall extend to the case of any such engagement as aforesaid, unless one part of the deed, instrument, or writing by which such engagement shall be made, given, or entered into, shall, within the space of two calendar months next after the date thereof, be deposited in the office of the registrar of the diocese wherein the benefice with cure of souls, dignity, prebend, or living ecclesiastical, for the resignation whereof such engagement shall be made, given, or entered into as aforesaid, shall be locally situate, except as to such benefices with cure of souls, dignities, prebends, or livings ecclesiastical, as are under the peculiar jurisdiction of any archbishop or bishop, in which case such document as aforesaid shall be deposited in the office of the registrar of that peculiar jurisdiction to which any such benefice with cure of souls, dignity, prebend, or living ecclesiastical, shall be subject; and such registrars shall respectively deposit and preserve the same, and shall give and sign a certificate of such deposit thereof; and every such deed, instrument, or writing shall be produced at all proper and usual hours at such registry to every person applying to inspect the same; and an office copy of each such deed, instrument, or writing, certified under the hand of the registrar (and which office copy so certified the registrar shall in all cases grant to every person who shall apply for the same), shall in all cases be admitted and allowed as legal evidence thereof in all courts whatsoever; and every such registrar shall be entitled to the sum of two shillings, and no more, for so depositing as aforesaid such deed, instrument, or writing, and so as aforesaid certifying such deposit thereof; and the sum of one shilling, and no more, for each search to be made for the same; and the sum of sixpence, and no more, over and besides the stamp duty, if any, for each folio of seventy-two words of each such office copy so certified as aforesaid."

Not to extend to any Engagements, unless the Deed be deposited within Two Months with the Registrar of the Diocese or peculiar Jurisdiction wherein the Benefice is situated.

Deed to be open to Inspection; and a certified Copy to be admitted as Evidence.

Fees to Registrar.

[Sect. 5. "That every resignation to be made in pursuance of any such engagement as aforesaid shall refer to the engagement in pursuance of which it is made, and state the name of the person for whose benefit it is made; and that it shall not be lawful for the

Resignation to state the Engagement, and Name of Person for whom made.

Resignation
Bonds.

Resignation
to be void
unless the
Person be
presented
within Six
Months.

Nothing
herein to
extend to
Presentations
made by the
King, &c.

31 Eliz.
c. 6,
Construction
of.

ordinary to refuse such resignation, unless upon good and sufficient cause to be shown for that purpose; and that such resignation shall not be valid or effectual, except for the purpose of allowing the person for whose benefit it shall be so made to be presented, collated, nominated, or appointed to the spiritual office thereby resigned, and shall be absolutely null and void unless such person shall be presented, collated, nominated, or appointed as aforesaid within six calendar months next after notice of such resignation shall have been given to the patron or patrons of such spiritual office."

[Sect. 6. "Provided also, that nothing in this act shall extend to any case where the presentation, collation, gift, or bestowing to or of any such spiritual office as aforesaid shall be made by the king's most excellent majesty, his heirs or successors, in right of his crown or of his duchy of Lancaster; or by any archbishop, bishop, or other ecclesiastical person, in right of his archbishopric, bishopric, or other ecclesiastical living, office, or dignity; or by any other body politic or corporate, whether aggregate or sole, or by any other person or persons, in right of any office or dignity; or by any company, or any feoffees or trustees for charitable or other public purposes; or by any other person or persons not entitled to the patronage of such spiritual office as private property."

[The language of the 31 Eliz. c. 6, as to all covenants, gifts, &c. &c. is, as we have seen (sect. 5), that they—]

Shall be utterly void, frustrate, and of none effect in Law.—Before this act, they were only voidable by deprivation; but hereby they are made void without any deprivation, or sentence declaratory in the ecclesiastical court, as was adjudged in the case of *Hickcock v. Hickcock*; so as the parishioners may deny their tithes, and allege in the spiritual court that he came in by simony. But Hutton said, there was no remedy for the tithes which a simoniacal incumbent had actually received (*u*). Parishioners, in an action for treble damages, may plead him no parson, because of the simony (*x*). But in an action for use and occupation, by an incumbent against a tenant of the glebe lands, the defendant cannot give evidence of a simoniacal presentation of the plaintiff in order to avoid his title, because having occupied by the licence of his landlord, he cannot afterwards, in such an action, dispute his title (*y*).

But here is to be observed a diversity between a presentation or collation, made by a rightful patron and an usurper. For in case of the rightful patron, which doth corruptly present or collate, by the express letter of this act the king shall present; but when one doth usurp, and corruptly present or collate, there the king shall not present, but the rightful patron: for the branch that gives the king power to present, is only intended where the rightful patron is in fault; but where he is in no fault, there the corrupt act and wrong of the usurper shall not prejudice his title (*z*).

(*u*) 1 Inst. 120; Gibs. 800; 1 Litt. Rep. 177.

(*x*) Hob. 168; March. 84.

(*y*) *Cooke v. Loxley*, 5 T. Rep. 4.

(*z*) 3 Inst. 153.

And it shall be lawful for the Queen to present for that one Time or Turn only.—In this particular the penalty of simony which was by the canon law, with regard to the patron, is somewhat mitigated, the canons which had been made both at home and abroad (when they speak of this loss of patronage) making it perpetual (*b*). But because patronage in England is accounted a temporal matter, and corrupt patrons were not to be reached by the ecclesiastical laws (which could only touch the incumbent); therefore, for the more effectual discouragement of simony, by affecting the patron also, this statute was made (*c*).

Resignation
Bonds.
31 Eliz. c. 6,
Construction
of.

And every Person that shall take or make any such Promise.—So that the penalty (as it seemeth) is incurred by such promise, though the patron should afterwards present the clerk gratis (*d*).

Shall forfeit and lose the Double Value of One Year's Profit.—And this double value shall be accounted, according to the true value as the same may be letten, and shall be tried by a jury, and not according to the valuation in the king's books (*e*).

And the Person so corruptly taking, procuring, seeking, or accepting.—It was said by Tanfield, Chief Baron, in *Calvert and Kitchyn's case*, that if a clerk *seeketh* to obtain a presentation by money, although afterwards the patron present him gratis, yet this simonaical attempt hath disabled him to take that benefice (*f*).

Be adjudged a disabled Person in Law, to have or enjoy the same Benefice.—Many of the ancient canons of the church make *deposition* the punishment of simony, whether in bishops or presbyters; others make it *deprivation*. But the civil and canon law observe a difference in point of penalty between a person guilty of simony and a person simoniacally promoted. If the clerk himself is privy or party to the simony, he is to be deprived of that, and for ever disabled to accept any other; but if he is only simoniacally promoted by simony between two other persons, whereunto he was not privy, he is deprivable by reason of the corruption, but not disabled to take any other. In like manner, according to this statute, if the presentee was not privy to the simony, though the church is become void by the simony, yet he is not disabled from being presented again; for a man cannot be said to be *corruptly taking*, who is not privy to the corrupt agreement. But a presentee who was privy to the simony, is a person disabled to enjoy the same benefice during life, nor can the king or any other dispense with the disability (*g*).

(*b*) "Qui emit jus patronatûs ut possit præsentare filium vel nepotem seu quem vult, eo privari debet." 8 X. 3, 18, 6.

(*c*) Gibs. 801.

(*d*) Gibs. 801.

(*e*) 3 Inst. 154.

(*f*) Gibs. 801.

(*g*) Ibid.; 2 Hawk. 396; 12 Co. 101.

31 Eliz. c. 6,
Construction
of.

Rex v. The Bishop of Oxford (h). A rule was obtained, calling on the bishop to show cause why a writ of *mandamus* should not issue, commanding him to license the Reverend Isaac Knipe, clerk, to officiate as chaplain or curate of the church or chapel of Piddington. The chapel was endowed by deed in 1428, whereby it was provided that the curate should receive all the small tithes, and be appointed by the inhabitants. In 1797 an act passed for inclosing certain lands in the township of Piddington, which left the right of the curate as to tithes on the same footing as it stood previous to the passing of the act. In 1801, upon a vacancy, the inhabitants appointed and presented a curate upon an agreement signed by him and the principal inhabitants, whereby he admitted that a certain sum of money therein specified was the *immemorial* money payment to the curate out of the lands of the township. It was held by the Court of King's Bench, that this agreement, entered into for the purpose of restraining the curate from asserting his claim to the small tithes by due course of law, and furnishing evidence against his successors, was *simoniacal*, and the presentation made thereon void.

S. 6. *Admit, institute, install, induct.*]—The reason of this clause, Lord Coke tells us (for, he says, he was of that parliament, and observed the proceedings therein) was to avoid hasty and precipitate admissions and institutions to the prejudice of them that had right to present, by putting them to a *quare impedit*; and it is presumed that no such haste or precipitation is used but for a corrupt end and purpose (i).

Immediately after the Investing, Installation, or Induction.]—Albeit the church is full by institution, against all but the king: yet the church becometh not void by this branch of the act until after induction (j).

S. 9. *Shall not in anywise extend to take away or restrain any Punishment, Pain, or Penalty, limited, prescribed, or inflicted by the Laws Ecclesiastical.*]—So far are the ancient ecclesiastical laws against simony, and the power of the spiritual court in the execution of those laws, from being superseded by this act, that hereby they are expressly confirmed. And all promises and contracts of what kind soever being forbidden, and by consequence punishable by the laws ecclesiastical, it follows that it could not be the intention of the legislators to make this statute the rule and measure of simony, but only to check and restrain it in the most notorious instances (k).

Which consideration seemeth fully to warrant Bishop Stillingfleet's observation, that this statute doth not abrogate the ecclesiastical laws as to simony, but only enacteth some particular penalties on some more remarkable simoniacal acts, as to

(h) 7 East's Rep. 600.

(i) 3 Inst. 155.

(j) 3 Inst. 155.

(k) Gibs. 801.

benefices and orders; but doth not go about to repeal any ecclesiastical laws about simony, or to determine the nature and bounds of it; and also the observation of Archbishop Wake, that this act is not privative of the jurisdiction of the church, or its constitutions, but accumulative; that it leaveth to the church all the authority which it had before; only whereas before these crimes were inquirable and punishable by the ecclesiastical judge alone, they may now in some cases specified in this statute, be brought before the civil magistrate also (*l*).

31 Eliz. c. 6,
Construction
of.

[III. *Punishable in Ecclesiastical Court.*

[In *Baker v. Rogers* (*m*) it was said, "It appertains to the spiritual court to determine simony, and not to this court (Common Pleas) to meddle therewith; and in *Risby v. Wentworth* (*n*), the court agreed, on application for a prohibition, that *simony might be more aptly tried in the spiritual court*, and a consultation was awarded.—ED.]

And therefore still the ecclesiastical court may proceed against a simonist *pro salute animæ*, and upon examination and evidence deprive him for that cause; and this, although he was not privy to the contract; for there are no accessaries in simony. And when the spiritual court hath so sentenced the simony, the temporal court ought to give credence thereto, and ought not to dispute whether it be error or not. For the temporal court cannot take cognizance of their proceedings herein, whether they be lawful or not; which is the reason that in the temporal court it sufficeth to plead a sentence out of the spiritual court briefly, without showing the manner thereof, and of their proceedings (*o*). And though it hath been said that in the spiritual court they ought not to intermeddle to divest the freehold, which is in the incumbent after induction; it is true, indeed, they cannot alter the freehold, but they by their proceeding meddle only with the manner of obtaining the presentment, which by consequence only divesteth the freehold from the simonist by the dissolution of his estate, when his admission and institution are voided, and therefore may proceed; or rather the church being made void by act of parliament, he who pretends to be incumbent thereof hath no freehold therein: so depriving of him cannot be said to divest any freehold from him. However, it is best that not any of the articles to be examined upon in this case, be such as may expressly draw the right and title of the benefice into question, lest occasion be taken from thence to bring a prohibition (*p*).

[The first reported case of a proceeding in the Ecclesiastical

(*l*) Gibs. 798.

(*m*) [1 Cro. 78.]

(*n*) [Ibid. 642.]

(*o*) 2 Bulst. 182; Freem. 84.

(*p*) Wats. c. 5.

Case of *Dobie v. Masters*.
The Ecclesiastical Courts have Jurisdiction to try Questions of Simony.

Court is that of the office of the judge promoted by *Dobie v. Masters* (q).

[Phillimore moved the court in the behalf of Alexander Dobie, of the parish of Saint Clement's Danes, to allow the office of the judge to be promoted against the Rev. John Whalley Masters, rector of Chorley in Lancashire, in a cause of simony; and to permit a citation to be taken out against him for having purchased the immediate possession of the vicarage of Saint Nicholas, in the castle of Carisbrook, in the Isle of Wight.

[He stated that there could be no doubt as to the jurisdiction of the court on a question of this description; for that the statute of the 31st of Elizabeth specially guarded against taking away the right of the spiritual courts, and that subsequent to the passing of that act many dicta were to be found in books and adjudged cases which seemed to countenance the idea that the ecclesiastical court was a more suitable forum on questions of simony than the temporal courts. *Risby v. Wentworth* (r), 40th of Elizabeth; *Baker v. Rogers* (s); and in both which cases prohibitions had been refused.

[In *Boyle v. Boyle* (t), Pollexfen, J., in pointing out that the spiritual courts might have jurisdiction in some respects over the same subject-matter as the temporal courts, used this illustration: "So, after a man is found no simonist in this court, the ecclesiastical court may very well examine the same matter." No doubt exists on this point in any of the writers who have treated on the subject: Degge (u), Bishop Gibson (x),

(q) [3 Phill. 171.]

(r) [Prohibition upon a sale for tithes; and grounds his prohibition upon the statute of 31st of Elizabeth, supposing that the said parson had committed simony in coming to the parsonage; and thereby the church was void, and the tithes not appertaining unto him. And it was agreed, *per curiam*, Glanville *absente*, that a prohibition lay not; for the simony might more aptly be tried in the spiritual court. Cro. Eliz. 642.]

(s) [All the court held that the prohibition lay not: for as to the first, although the presentee came in *quasi per usurpationem*, yet because it is by means of a simoniacal contract which is the cause thereof (for otherwise it is to be intended that he would not have permitted that presentment) it was held that it was as well a simony as if the grant had not been void. And, as to the second, they held it to be simony; for there be not any accessories in simony; but all are principals therein, as well as in trespass; and it appertains to the

spiritual court to determine it, and not to this court to meddle therewith. And when the spiritual court hath so sentenced it, this court ought to give credence thereto, and ought not to dispute whether it be error or not, &c. &c. &c. Cro. Eliz. 789.]

(t) [*Boyle v. Boyle* was a case in which a prohibition was moved for to the spiritual court in a cause of jactitation of marriage. Com. 72.]

(u) [The fourth paragraph (of the 31st of Elizabeth) preserves the ecclesiastical jurisdiction, that they may proceed judicially to censure the parties for their corruption in buying and selling church preferments. Wherein, as should seem, the ecclesiastical laws, in some circumstances, are more severe than this statute; for by that law, as I take it, he that is convicted of simony is after incapacitated not only to that living, but to all other church preferments: but of this be informed by the canonist. Degge, p. 61.]

(x) [Gibson, 798—801.]

and the author of Watson's (y) Incumbent. The books of practice, too, are clear and explicit. In Clarke's Praxis the mode of proceeding is pointed out: "Si (z) clericus commisit simoniam in obtinendo beneficium ecclesiasticum, potest sive ex officio judicis, sive ad instantiam partis conveniri ac juxta sanctiones canonicas puniri, sic etiam laici participes ejusdem criminis."

Case of *Dobie v. Masters*.
Jurisdiction of Ecclesiastical Courts.

[This passage has been adopted by Oughton to its full extent (a).]

[Judgment.—Sir John Nicholl said the authorities were satisfactory with respect to the principle; but directed a search to be made for any cases which might have been decided in the ecclesiastical courts.

[Phillimore cited the case of the office of the judge promoted by *Lucy v. The Bishop of St. David's* (b), in which the delegates were unanimously of opinion that the ecclesiastical court was fully competent to try the question; and finally affirmed the sentence of the inferior court, by which the bishop had been found guilty of simony. (*Vide post*, this case.)

[*Per curiam*.—Let the citation issue.

[But this cause never came to a decision. In the case of *Whish and Woollatt v. Hesse* (clerk), in 1832, in a criminal proceeding of a like description, Sir J. Nicholl said, "It is a crime of no light character; not only by the ecclesiastical law, but by the common law, it is held to be a crime most highly odious, and especially in a clergyman, since, as Lord Coke observes, it involves the crime of perjury." "Simony is odious in the eye of the common law." "It is the more odious because it is ever accompanied by perjury, for the presentee is sworn to commit no simony (c)." "Simony hath always, by the law of God and of the land, been accounted a great offence (d)." "And it is very well known that every clergyman takes a solemn oath before his diocesan that there has been nothing promised to be done or to be undertaken by or for him, and that he will not perform any such promise made without his knowledge. Such is the magnitude of the offence charged. The consequences of simony are also very serious:

Case of
Whish and Woollatt v. Hesse.

(y) [Watson's Clergyman's Law, c. 5.]

(z) [Clarke's Praxis, tit. 132.]

(a) [Oughton, vol. i. tit. 4.]

(b) [Deleg. Feb. 22, 1699. The court was composed of a full commission, consisting of several temporal and ecclesiastical peers, besides common law judges and civilians. Treby, Chief Justice of the Common Pleas; Ward, Chief Baron of the Exchequer; and Sir Charles Hedges, Judge of the Admiralty, were of the number.

[The suit was originally promoted before the Archbishop of Canterbury (Tennison), in a court held at Lambeth, before the archbishop in person, assisted by six suffragan bishops. *Ld. Raym.* 447, 539, 545, 817; 2 *Warn.* 656; *Gibs.* 1006. Bishop Burnet has given an account of the trial and deprivation of this bishop, vol. ii. 226, and again 250.]

(c) [3 *Inst.* 156.]

(d) [*Cro. Car.* 353.]

under the statute of Elizabeth the living is void. The presentation devolves to the crown, and the guilty presentee is incapacitated, and liable to a penalty of two years' full value of the living (*f*).” But in this case the court holding, first, that the clerk proceeded against had not been proved to be privy to having made or confirmed any simoniacal contract; secondly, that no criminal contract had been established, dismissed him from the suit, and condemned his prosecutor in costs. It was thought to have been intimated in the course of the suit that an ecclesiastical court cannot proceed to deprivation in a criminal suit against a clerk who is *simoniacè promotus*, without his privy or subsequent confirmation.

Case of *The
Bishop of
St. David's.*

[Dr. Watson was promoted to the see of St. David's in 1687. Archbishop Tillotson had visited the diocese of St. David's, and in right of his visitatorial power suspended the bishop: he, notwithstanding this, collated; whereupon the archbishop cited him before him: he appeared and submitted. Archbishop Tennison, on the death of Tillotson, succeeded to the see of Canterbury.

[Afterwards one Lucy instituted proceedings against the bishop for simony, or, as it is expressed in the citation, *propter simoniam sive crimen simoniacæ pravitatis*. The bishop was deprived, and appealed to the Delegates; pending the appeal, Sir Bartholomew Shower applied for a prohibition on behalf of the bishop. The case is reported (*g*) under the name of *The Bishop of St. David's v. Lucy*. The first objection raised was as to the jurisdiction; and Holt, C. J., said, that the admitting that point of jurisdiction to be disputed, would be to admit the dispute of fundamentals.

[The counsel then moved that the matters were of temporal conusance, and not conusable by the archbishop,—that the contract amounted only to a temporal contract; but the whole court was of opinion, that though it was a contract it was a simoniacal contract, and then it will be examinable in the spiritual court; not whether the contract ought to be performed or not, but to punish the party by ecclesiastical censures: this was proper before the statute of Elizabeth, and it was saved by the statute. That the common law takes no notice of any simony but that which the statute enjoins; and the statute has not defined simony in any manner as to say what shall be simony and what not by the ecclesiastical law.

[Another argument for the prohibition was, that the charge was for taking excessive fees, which was punishable by indictment at common law; to this it was answered by the counsel, that these offences by the canon law, and in the spiritual court, were simony, *quod fuit concessum per totam curiam*.

(*f*) [3 Hagg. 693.]

(*g*) [Ld. Raym. Rep. vol. i. 447.]

[Other objections were urged: but the court said, that the distinction which would answer almost all the objections was this, that as to that which relates to the office of bishop, and against his duty as a bishop, the spiritual court may proceed against him to deprive him, but not punish him as for a temporal offence; and cited *Sir John Savage's case* (*h*), and *Cawdry's case* (*i*), where upon a special verdict found, it appeared that Cawdry was deprived by the high commissioners for preaching against the common prayer; and though there was other punishment appointed by the statute, and not deprivation till the second offence, yet it was held that they might well proceed by *their own law*, and deprive him; it being against the duty of his office as a minister, and they having sworn to purge their body of all scandalous members.

Case of *The Bishop of St. David's.*

[The Bishop of St. David's afterwards applied for a prohibition against the Delegates, which was refused.

[After the denial of the prohibition he petitioned the chancellor for a writ of error, which was at first granted; but the lords of parliament were of opinion that a writ of error would not lie in the case.

[In 1695, the bishop instituted proceedings in the House of Lords, and claimed the privilege of his peerage (*j*). Sir Thomas Powys, Sir Bartholomew Shower, and Dr. Oldys, were his counsel; Mr. Serjeant Wright, Dr. Walker, and Dr. Cook, counsel for the archbishop; and the attorney-general appeared for the crown.

[One of the objections raised was, that witnesses had been permitted to give evidence against the bishop who were manifestly disqualified; but this and various other objections were overruled; and the House of Lords, after much discussion, refused to interfere, and the sentence of deprivation against the bishop was carried into execution (*k*).

[The tenor of the sentence was: "Propter diversa crimina et excessus, et præsertim crimen simoniæ sive simoniacæ pravitatis."

[One charge was his appointing a clergyman to a living "turpis lucri, et proprii quæstûs causâ, intervenientibus fraude, pacto, et simoniacâ pravitate." And the transactions were described in the sentence to be "contrà sacros canones et leges in Ecclesiâ Anglicanâ receptas."

[In the year 1840, the Archbishop of York instituted a visitation of the Cathedral Church of York (*l*), and appointed Dr. Phillimore his commissary for the purpose of carrying it into

Dean of York's Case.

(*h*) [Keilw. 194.]

(*i*) [5 Co.]

(*j*) [Lord Raymond, observes Holt, C. J., told me that if the Lords had been of opinion that the prohibition

ought to have been granted he never would have granted it.]

(*k*) [State Trials, vol. xiv. 443.]

(*l*) [See title *Deans and Chapters*, vol. ii.; and title *Visitation*.]

*Dean of
York's Case.*

execution. Among other *presentments* made to the commissary was one charging the dean with selling the presentations to the vicarages in his patronage. The learned commissary observed:

["I wish to be clearly and distinctly understood, as holding the statute law to have no possible application to this case. Simony is not an offence at common law, but by the canon law, and till the statute of Elizabeth (*l*) the temporal courts had no cognizance of or jurisdiction over it, and now they have only such jurisdiction as the limitations of that statute, and a subsequent statute of the 12th Anne (*m*), have conferred on them.

["I do not sit here to expound or to interpret the law of the temporal courts,—I have no authority to do so,—nor if I had authority to do so, am I competent to the task. I studiously and anxiously throw out of my consideration the statutes to which I have referred, passed principally with a view to make the laity, and, in some instances, the clergy, liable to temporal punishment. Again, I place equally out of consideration any law against simony which may be applicable to the laity. Lay patrons are happily without the sphere of the ecclesiastical jurisdiction; I say happily, because this circumstance enables me to steer clear of all questions intermixed with technicalities, and embarrassed by questions of property, which partake of no sacred character, and can have no bearing on that law which is applicable to spiritual persons alone, who hold their property in trust for the performance of holy services to which the Church of England has consecrated them. This distinction between those matters which affect the clergy and laity severally, and still more the distinction between the administration of the temporal and ecclesiastical laws, is upheld and sanctioned by the highest authority, and is of the very essence of the constitutional law of this realm. It is clearly recognized by the statute of the 29 Hen. 8, c. 12, which passed at the dawn of the Reformation."

[The learned commissary then cited *Cowdrie's case* (*n*), in which Lord Coke, treating of the ecclesiastical laws, follows the words of this statute, the cases in the 1 & 9 Cro. Eliz. 78, 642, already cited, and proceeded—

["In the same spirit, Lord Chief Justice Holt, in the memorable case of *The Bishop of St. David's v. Lucy* (*o*), expounds the different operation of the ecclesiastical and temporal law, and the necessity of maintaining and upholding each of them distinct and inviolate.

["Simony is an offence by the canon law, of which the common law does not take notice, to punish it; for there is not a word of simony in the statute (*p*) of Elizabeth, but of buying

(*l*) [31 Eliz. c. 2.]
(*m*) [12 Anne, c. 2—12.]
(*n*) [5 Co.]

(*o*) [Raym. Rep. 449.]
(*p*) [That is, not in the *enacting* part of the statute.]

and selling. Then it would be very unjust if ecclesiastical persons might offend against the ecclesiastical duty in such instances, of which the common law cannot take notice to punish them, and yet the King's Bench should prohibit the spiritual court from inflicting punishment according to their law. The clergy are subject to a law different from that to which laymen are subject, for they are subject to obey the canons, for the convocation of the clergy may make laws to bind all the clerks, but not the lay people. And if the clergy do not conform themselves, it will be cause of deprivation (*q*). Resolved by all the judges of England. And by such authority were the *canons of the year 1603 made, which make simony so great an offence.* And the said canons have been always received. And many of the ancient canons are as old as any law that we have at this time.' "

*Dean of
York's Case.*

[This chain of authorities was closed by this extract from Blackstone's Commentaries (*r*): — " 'Corporations, being composed of individuals subject to human frailties, are liable, as well as private persons, to deviate from the ends of their institution, and for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil, or eleemosynary. With regard to all ecclesiastical corporations, the ordinary is *their visitor, so constituted by the canon laws, and from them derived to us.*' "

[The Court of Queen's Bench subsequently annulled this judgment on the ground that the visitor had exceeded his powers, and that he ought to have proceeded under 3 & 4 Vict. c. 86 (*s*). But they expressed no opinion whatever on the question of simony. It was afterwards intended to proceed *de novo* against the dean under the 3 & 4 Vict. c. 86, and the opinion of the attorney-general, Sir John (afterwards Lord) Campbell, was taken as to whether the dean, being a spiritual person, was not guilty of simony in selling the next presentation to livings in his gift.

[“ I am of opinion that it will be proper in this case to institute proceedings under 3 & 4 Vict. c. 86. I conceive that for a spiritual person to sell the next presentation of a living which he holds by right of his benefice, whether voidable or not (*t*), is simony by the canon law; and I think that the dean's letter, coupled with the evidence of John Singleton, makes out such a case of simony. No reasonable man can doubt that the advance of the 100*l.* was the consideration for the grant of the next presentation, whatever colour one of the parties may try

(*q*) [2 Cro. 37.]

(*r*) [Vol. i. p. 480.]

(*s*) [See title *Privileges and Restraints of the Clergy.*]

(*t*) [The Queen's Advocate and Dr. Nicholl are understood to have given a different opinion.—Ed.]

to give it. The presentation of Taylor was, I think, an offence within the two years, although the agreement to present might be beyond the two years.

(Signed) "J. CAMPBELL."

"Temple, 21st June, 1841."

[IV. Other Matters.

3 & 4 Vict.
c. 113.

[These sales of presentations in *The Dean of York's case* took place before the 3 & 4 Vict. c. 113, which enacts by s. 42,

Spiritual
Person not to
sell or assign
any Right of
Patronage.

"That it shall not be lawful for any spiritual person to sell or assign any patronage or presentation belonging to him by virtue of any dignity or spiritual office held by him, and that every such sale or assignment shall be null and void to all intents and purposes."

[It seems to have been decided, in the case of *Alston v. Atlay*, that the sale of the advowson of *voidable* living was simoniacal (*u*).—ED.]

After Death
of the Person
simoniacally
promoted,
Offence of
Simony not
to injure in-
nocent Clerk
or Patron.

By the 1 Will. 3, c. 16, ss. 1 & 2, "Whereas it hath often happened, that persons simoniac or simoniacally promoted to benefices or ecclesiastical livings, have enjoyed the benefit of such livings many years, and sometimes all their life-time, by reason of the secret carriage of such simoniacal dealing, and after the death of such simoniac person, another person, innocent of such crime, and worthy of such preferment, being presented or promoted by any other patron innocent also of that simoniacal contract, have been troubled and removed upon pretence of lapse or otherwise, to the prejudice of the innocent patron in reversion, and of his clerk, whereby the guilty goeth away with the profit of his crime, and the innocent succeeding patron and his clerk are punished, contrary to all reason and good conscience; for prevention thereof it is enacted, that after the death of the person so simoniacally promoted, the offence or contract of simony shall, neither by way of title in pleading, or in evidence to a jury, or otherwise, be alleged or pleaded to the prejudice of any other patron innocent of simony, or of his clerk by him presented or promoted, upon pretence of lapse to the crown, or to the metropolitan, or otherwise; unless the person simoniac or simoniacally promoted, or his patron, was convicted of such offence at the common law, or in some ecclesiastical court, in the life-time of the person simoniac or simoniacally promoted or presented."

(*u*) [See title *Plurality*, p. 119, in S. C. 6 Nev. & Man. 686, Exch. this volume; and 7 Ad. & Ell. 311; Chamb. C. J. Tindal.]

Sect. 3. "And no lease really and *bonâ fide* made by any person simoniac or simoniacally promoted to any deanry, prebend, or parsonage, or other ecclesiastical benefice or dignity, for good and valuable consideration, to any tenant or person not being privy to or having notice of such simony, shall be impeached or avoided for or by reason of such simony, but shall be good and effectual in law, the said simony notwithstanding."

By the 12 Anne, st. 2, c. 12, "Whereas some of the clergy have procured preferments for themselves by buying ecclesiastical livings, and others have been thereby discouraged, it is enacted, that if any person shall, for any sum of money, reward, gift, profit, or advantage, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant or other assurance of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, in his own name or in the name of any other person, take, procure, or accept the next avoidance of or presentation to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, and shall be presented or collated thereupon, every such presentation or collation, and every admission, institution, investiture, and induction upon the same, shall be utterly void, frustrate, and of none effect in law, and such agreement shall be deemed a simoniacal contract, and it shall be lawful for the queen, her heirs and successors, to present or collate unto, or give or bestow every such benefice, dignity, prebend, and living ecclesiastical, for that one time or turn only; and the person so corruptly taking, procuring or accepting any such benefice, dignity, prebend or living, shall thereupon and from thenceforth be adjudged a disabled person in law to have and enjoy the same, and shall also be subject to any punishment, pain or penalty, limited, prescribed or inflicted by the laws ecclesiastical, in like manner as if such corrupt agreement had been made, after such benefice, dignity, prebend, or living ecclesiastical had become vacant; any law or statute to the contrary in any wise notwithstanding."

A Clergyman may not purchase the next Presentation.

Which statute having been understood as only prohibiting *clergymen* from purchasing livings for themselves, the intention thereof (if that was its sole intention) may be easily frustrated by employing others to purchase for them. But surely this falls within the oath required by Can. 40; *vide ante*.

Sinecure.

THE original of sinecures was thus:—The rector (with proper consent) had a power to entitle a vicar in his church to officiate under him, and this was often done; and by this means,

Original of Sinecures.

two persons were instituted to the same church, and both to the cure of souls, and both did actually officiate. So that, however, the rectors of sinecures, by having been long excused from residence, are, in common opinion, discharged from the cure of souls (which is the reason of the name), and however the cure is said in the law books to be in them *habitualiter* only, yet, in strictness, and with regard to their original institution, the cure is in them *actualiter*, as much as it is in the vicar (*u*).

That is to say, where they come in by institution; but if the rectory is a donative, the case is otherwise, for there coming in by donation, they have not the cure of souls committed to them. And these are most properly sinecures according to the genuine signification of the word (*x*).

No Sinecure
where there
is but one
Incumbent.

But no church, where there is but one incumbent, is properly a sinecure. If indeed the church be down, or the parish become destitute of parishioners, without which, divine offices cannot be performed, the incumbent is of necessity acquitted from all public duty; but still he is under an obligation of doing this duty, whenever there shall be a competent number of inhabitants, and the church shall be rebuilt. And these benefices are more properly depopulations than sinecures (*y*).

Bishoprics,
Deaneries,
Archdeacon-
ries, Pre-
bends.

Bishoprics, deaneries, and archdeaconries, were of old generally said to have the cure of souls belonging to them: some have said the same of prebends, but with less reason. Bishops have the cure of their whole dioceses, and archdeacons do, in many particulars, share with them in their spiritual cures. The dean was said to have the cure of his canons, and of the rest belonging to the choir, who were all in old time to make their confessions to him, and receive absolutions from him; but it doth not appear, that the canons or prebendaries have or had the cure of souls, in this or any other respect. They are indeed for the most part instituted, but not to the cure of souls (*z*).

Possession of
Sinecures
how ob-
tained.

Possession of sinecures (not being exempt as is aforesaid) must be obtained by the same methods by which the possession of other rectories and vicarages is obtained, namely, by presentation, institution, and induction. And the reason is, because the vicarage had not its beginning by appropriation and endowment (which was a discharge to the parson from the cure), but by *intitulation*, that is, by being admitted to a title, or a share in the profits and cure of the rectory, together with the rector, and in subordination to him as vicar. For although by a constitution of Archbishop Langton there might not be two rectors or parsons in one church, yet there might be, and sometimes were established in the same church both a rector

(*u*) Gibs. 719; Johns. 85.
(*x*) Johns. 85.

(*y*) Johns. 84.
(*z*) Johns. 86.

and vicar, with cure of souls: and in such case, the rectory came to be a sinecure, not because it was really so in law, but because the rectors got themselves excused from residence, and by degrees devolved the whole spiritual cure upon the vicars (a).

Upon which ground, the possessors of sinecures are not bound to read the Thirty-nine Articles by the 13 Eliz. c. 12. And in this only, institution to sinecures differs from institution to other benefices (b).

Sinecures are not within the statute of pluralities, such livings being not by the said statute deemed incompatible; but only those to which the cure of souls is actually and not only habitually annexed (c).

[By 3 & 4 Vict. c. 113, it is enacted:

3 & 4 Vict.
c. 113.

[Sect. 48. "That all ecclesiastical rectories without cure of souls in the sole patronage of her Majesty, or of any ecclesiastical corporation, aggregate or sole, where there shall be a vicar endowed or a perpetual curate, shall, as to all such rectories as may be vacant at the passing of this act immediately upon its so passing, and as to all others immediately upon the vacancies thereof respectively, be suppressed; and that as to any such ecclesiastical rectory without cure of souls, the advowson whereof or any right of patronage wherein shall belong to any person or persons or body corporate other than as aforesaid, the ecclesiastical commissioners for England shall be authorized and empowered to purchase and accept conveyance of such advowson or right of patronage, as the case may be, at and for such price or sum as may be agreed upon between them and the owner or owners of such advowson or right of patronage, and may pay the purchase-money and the expenses of and attendant upon such purchase out of the common fund hereinafter mentioned; and that after the completion of such purchase of any such rectory, and upon the first avoidance thereof, the same shall be suppressed; and that upon the suppression of any such rectory as aforesaid all ecclesiastical patronage belonging to the rector thereof as such rector shall be absolutely transferred to and be vested in the original patron or patrons of such rectory."

Suppression
of Sinecure
Rectories.

[Sect. 54. "That upon the suppression of any ecclesiastical rectory without cure of souls all the estate and interest which the rector thereof, or his successor, has or had, or would have or have had, as such rector, in any lands, tithes, or other hereditaments or endowments whatsoever, shall, without any conveyance thereof, or any assurance in the law other than the provisions of this act, accrue to and be vested in the ecclesiastical commissioners for England and their successors for the purposes of this act."

Endowments
of suppressed
sinecure Rec-
tories vested
in Commis-
sioners.

[Sect. 55. "That if in any case it shall appear to be expedient, on account of the extent or population or other peculiar circumstances of the parish or district in which any such rectory without cure of souls shall be situate, or from the incompetent endowment of

As to certain
sinecure Rec-
tories.

(a) Gibs. 818.

(b) Johns. 86.

(c) Deg. pt. i. c. 13.

the vicarage or vicarages, or perpetual curacy or curacies, dependent on such rectory, to annex the whole or any part of the lands, tithes, or other hereditaments or endowments belonging to such rectory to such vicarage or vicarages, curacy or curacies, such annexation may be made, and any such vicarage or curacy may be constituted a rectory with cure of souls by the authority hereinafter provided; and that wherever any rectory heretofore deemed a rectory without cure of souls has been held together with the vicarage dependent thereon for the period of twenty years last past, the same shall not be construed to be a rectory without cure of souls within the meaning of this act, but such last-mentioned rectory and vicarage shall continue and be permanently united, and shall be a rectory with cure of souls; subject nevertheless to all the provisions of the thirdly-recited act, and to the provisions of this act which relate to the division of benefices or the apportionment of the incomes thereof."—ED.]

Singing of Psalms—See **Public Worship**.

Slander—See **Defamation**.

Son succeeding his Father in a Benefice—See **Benefice**.

Spoliation.

SPOLIATION is a writ obtained by one of the parties in suit, suggesting that his adversary (*spoliavit*) hath wasted the fruits, or received the same, to the prejudice of him who sueth out the writ(*d*).

And a cause of spoliation shall be tried in the spiritual court, and not in the temporal. And this suit lieth for one incumbent against another, where they both claim by one patron, and where the right of the patronage doth not come in question or debate. As if a parson be created a bishop, and hath a dispensation to keep his benefice, and afterwards the patron presents another incumbent, who is instituted and inducted; now the bishop may have against that incumbent a spoliation in the spiritual court, because they claim both by one patron, and the right of the patronage doth not come in debate, and because the other incumbent came to the possession of the benefice by the course of the spiritual law, that is to say, by institution and induction; so that he hath colour to

(*d*) 1 Ought. 13.

have it, and to be parson by the spiritual law: for otherwise, if he be not instituted and inducted, spoliation lies not against him, but rather a writ of trespass, or an assize of novel disseisin (*e*).

So it is also where a parson who hath a plurality doth accept another benefice, by reason whereof the patron presents another clerk, who is instituted and inducted. Now the one of them may have a spoliation against the other, and then shall come in debate whether he hath a sufficient plurality or not. And so it is case of deprivation (*f*).

The same law is, where one telleth the patron that his clerk is dead; whereupon he presents another; there the first incumbent, who was supposed to be dead, may have a spoliation against the other. And so in divers other like cases (*g*).

If a patron do present a clerk unto an advowson, who is instituted and inducted, and afterwards another man doth present another clerk to the same advowson, who is also instituted and inducted; there one of them shall not have a spoliation against the other, if he disturb him of the church, or do take way the fruits thereof; because the right of the patronage doth come in debate in the spiritual court which of the patrons hath a right to present. And therefore in that case, if one of them sue a spoliation against the other, he shall have prohibition unto the spiritual court, and no consultation shall be granted for the cause aforesaid (*h*).

When spoliation is brought to try which of two persons instituted is the rightful incumbent of a parsonage or vicarage, or after sentence given against one of the parties who hath appealed; it is usual for the ecclesiastical judge, at the petition of either of the parties, to decree that the fruits of the church be sequestered, and to commit the power of collecting them to the churchwardens or some others of the same parish, first taking bond of such persons, whereby they shall be obliged to collect and keep the tithes for the use of him that shall be found to have the right, and to render a just account when called thereunto. And the judge is also wont to appoint some minister to serve the cure, for the time that the controversy shall depend; and to command those to whom the sequestration is committed, to allow such salary as he shall assign out of the profits of the church, to the parson that he orders to attend the cure. And after the suit is determined, the sequestration is to be taken off, and the profits collected to be restored to him that prevails at law; to wit, in specie, if they remain so, or if not, the value of them (*i*).

(*e*) Terms of the Law.

(*f*) Ibid.

(*g*) Ibid.

(*h*) F. N. B. 86.

(*i*) Wats. c. 30.

Stamps.

MOST of the stamp duties are inserted under their respective *titles*; I therefore think it advisable to omit them here entirely, particularly as they are now so numerous that they would fill several pages.

Stipendiary Priests.

THE stipendiary priests were for trentals, anniversaries, obits, and such like, grounded on the doctrine of purgatory and masses satisfactory. And for these chantries were founded and endowed, to pray for the souls of the founder and his friends. Which chantries were dissolved by the statute of the 1 Edw. 6, c. 14.

Striking in Church or Churchyard—See **Church**.

Subdeacon.

SUBDEACON is one of the five inferior orders in the Romish Church; whose office it is to wait upon the deacon in the administration of the sacrament of the Lord's Supper (*j*).

Suffragan—See **Bishops**.

Suicide.

BY the rubric before the burial office, persons who have laid violent hands upon themselves shall not have that office used at their interment.

And the reason thereof given by the canon law is, because they die in the commission of a mortal sin (*k*); and therefore this extendeth not to idiots, lunatics, or persons otherwise of insane mind, as children under the age of discretion, or the like; so also not to those who do it involuntarily, as where a

(*j*) Gibs. 99.

(*k*) Lindw. 164.

man kills himself by accident: for in such case it is not their crime, but their very great misfortune.

[By 4 Geo. 4, c. 52, suicides are to be buried in the church yard at night, but no service is to be performed over them; see *Burial*.—ED.]

Sunday—See *Lord's Day*.

Superinstitution—See *Benefice*.

Supposititious Births—See *Bastards*.

Supremacy (l).

LORD Chief Justice Hale says: "The supremacy of the crown of England in matters ecclesiastical is a most indubitable right of the crown, as appeareth by records of unquestionable truth and authority" (*m*).

King's Supremacy by the Common Law.

Lord Chief Justice Coke saith: "By the ancient laws of this realm, this kingdom of England is an absolute empire and monarchy, consisting of one head, which is the king, and of a body consisting of several members, which the law divideth into two parts, the clergy and laity, both of them next and immediately under God subject and obedient to the head" (*n*).

By the parliament of England in the 16 Rich. 2, c. 5, it is asserted, that the crown of England hath been so free at all times that it hath been in no earthly subjection, but immediately subject to God in all things touching the regality of the same crown, and to none other.

And in the 24 Hen. 8, c. 12, it is thus recited: "By sundry and authentic histories and chronicles it is manifestly declared and expressed, that this realm of England is an empire, and so hath been accepted in the world, governed by one supreme head and king, having dignity and royal estate of the imperial crown of the same; unto whom a body politic, compact of all sorts and degrees of people, divided in terms and by names of spirituality and temporality, been bounden and owen to bear next unto God a natural and humble obedience; he being also furnished by the goodness and sufferance of Almighty God, with plenary, whole and entire power, pre-eminence,

(l) [See titles *Church in England and Ireland* and *Church in Scotland*.]

(m) 1 H. H. 75.

(n) 5 Co. 8, 40, *Cawdrey's case*.

authority, prerogative, and jurisdiction, to render and yield justice and final determination to all manner of persons residing within this realm, in all cases, matters, debates, and contentions, without restraint or provocation to any foreign princes or potentates of the world; in causes spiritual by judges of the spirituality, and causes temporal by temporal judges."

Again, 25 Hen. 8, c. 21: "The realm of England, recognizing no superior under God, but only the king, hath been and is free from subjection to any man's laws, but only to such as have been devised, made and obtained within this realm for the wealth of the same, or to such other as by sufferance of the king, the people of this realm have taken at their free liberty by their own consent to be used amongst them, and have bound themselves by long use and custom to the observance of the same, not as to the observance of the laws of any foreign prince, potentate or prelate, but as to the customed and ancient laws of this realm, originally established as laws of the same by the said sufferance, consents and custom, and none otherwise."

By the Canons of the Church.

Can. 1. "As our duty to the king's most excellent majesty requireth, we first decree and ordain, that the archbishop from time to time, all bishops, deans, archdeacons, parsons, vicars, and all other ecclesiastical persons, shall faithfully keep and observe, and as much as in them lieth shall cause to be observed and kept of others, all and singular laws and statutes made for restoring to the crown of this kingdom, the ancient jurisdiction over the state ecclesiastical, and abolishing of all foreign power repugnant to the same. Furthermore, all ecclesiastical persons having cure of souls, and all other preachers, and readers of divinity lectures, shall to the uttermost of their wit, knowledge and learning, purely and sincerely (without any colour or dissimulation) teach, manifest, open and declare, four times every year at the least, in their sermons, and other collation and lectures, that all usurped and foreign power (forasmuch as the same hath no establishment nor ground by the law of God) is for most just causes taken away and abolished, and that therefore no manner of obedience or subjection within his majesty's realms and dominions is due unto any such foreign power; but that the king's power, within his realms of England, Scotland and Ireland, and all other his dominions and countries, is the highest power under God, to whom all men, as well inhabitants as born within the same, do by God's laws owe most loyalty and obedience, afore and above all other powers and potentates in the earth."

Can. 2. "Whoever shall affirm, that the king's majesty hath not the same authority in causes ecclesiastical, that the godly kings had amongst the Jews, and Christian emperors of the primitive church, or impeach any part of his regal supremacy in the said causes restored to the crown, and by the laws of

this realm therein established; let him be excommunicated *ipso facto*, and not restored but only by the archbishop, after his repentance and public revocation of those his wicked errors."

Can. 26. "No person shall be received into the ministry, nor admitted to any ecclesiastical function, except he shall first subscribe (amongst others) to this article following: that the king's majesty under God is the only supreme governor of this realm, and of all other his highness's dominions and countries, as well in all spiritual or ecclesiastical things or causes, as temporal; and that no foreign prince, person, prelate, state, or potentate, hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within his majesty's said realms, dominions and countries."

Art. 37. "The queen's majesty hath the chief power in this realm of England, and other her dominions; unto whom the chief government of all estates of this realm, whether they be ecclesiastical or civil, in all causes doth appertain; and is not, nor ought to be, subject to any foreign jurisdiction. But when we attribute to the queen's majesty the chief government, we give not thereby to our princes the ministering either of God's word or of the sacraments; but that only prerogative which we see to have been given always to all godly princes in Holy Scripture by God himself; that is, that they should rule all estates and degrees committed to their charge by God, whether they be ecclesiastical or temporal, and restrain with the civil sword the stubborn and evil doers. The Bishop of Rome hath no jurisdiction in this realm of England."

By the
Thirty-nine
Articles.

"Albeit the king's majesty justly and rightfully is, and ought to be, the supreme head of the Church of England, and so is *recognized by the clergy of this realm in their Convocations*; yet nevertheless, for corroboration and confirmation thereof, and for the increase of virtue in Christ's religion, and to repress all errors, heresies, and other enormities and abuses, it is enacted, "that the king, our sovereign lord, his heirs and successors, kings of this realm, shall be taken, accepted and reputed the only supreme head in earth of the Church of England; and shall have and enjoy, annexed to the imperial crown of this realm, as well the style and title thereof, as all honours, dignities, pre-eminences, jurisdictions, privileges, authorities, immunities, profits, and commodities, to the said dignity of supreme head of the same church belonging and appertaining; and shall have power from time to time to visit, repress, redress, reform, order, correct, restrain, and amend all such errors, heresies, abuses, offences, contempts, and enormities whatsoever they be, which by any manner of spiritual authority or jurisdiction may lawfully be reformed, repressed, ordered, redressed, corrected, restrained, or amended most to the pleasure of Almighty God, the increase of virtue in Christ's religion, and for the conservation of the peace, unity and

By Act of
Parliament.

tranquillity of this realm; any usage, custom, foreign laws, foreign authority, prescription, or any other thing to the contrary notwithstanding (o)."

Recognized by the Clergy of this Realm in their Convocations.]—Which recognition, after deliberation and debate in both houses of convocation, was at length agreed upon in these words,—*Ecclesiæ et cleri Anglicani, cujus singularem protectorem unicum, et supremum dominum, et quantum per Christi legem licet, etiam supremum caput ipsius majestatem, recognoscimus* (p).

The King's
Style and
Title.

"Whereas the king hath heretofore been, and is justly and lawfully, and notoriously known, named, published and declared to be king of England, France and Ireland, defender of the faith, and of the Church of England and also of Ireland in earth supreme head, and has justly and lawfully used the title and name thereof; it is enacted, that all his majesty's subjects shall from henceforth accept and take the same his majesty's style, as it is declared and set forth in manner and form following, viz. 'Henry the Eighth, by the grace of God, king of England, (since the union with Scotland, king of Great Britain,) France and Ireland, defender of the faith, and of the Church of England and also of Ireland in earth the supreme head:' and the said style shall be for ever united and annexed to the imperial crown of this realm (q)."

Defender of the Faith.]—This title, although sometimes attributed to our kings before, yet was peculiarly and in a more solemn manner given to King Henry the Eighth by Pope Leo the Tenth, for writing against Luther.

And of the Church of England and also of Ireland in Earth the supreme Head.]—These are the words which seem to be understood, in the abbreviated style of the king, as it is now usually expressed, [*defender of the faith and so forth.*]

Penalty of
denying
the King's
Supremacy.

By the 1 Edw. 6, c. 12, s. 6, 22, if any person shall by *open preaching, express words or sayings*, affirm or set forth, that the king is not, or ought not to be, supreme head in earth of the Church of England and Ireland, or any of them, immediately under God; or that the bishop of Rome, or any other person than the king of England for the time being, is, or ought to be by the laws of God, supreme head of the same churches or of any of them; he, his aiders, comforters, abettors, procurers and counsellors, shall (on conviction by the oath of two witnesses or confession) for the first offence forfeit his goods, and be imprisoned during the king's pleasure: for the second offence shall forfeit his goods, and also the profits of his lands and spiritual promotions during his life, and also be imprisoned during his life; and for the third offence, shall be guilty of high treason.

Sects. 7, 22. "And if any person shall by *writing, printing,*

(o) 26 Hen. 8, c. 1.

(p) Gibs. 23.

(q) 35 Hen. 8, c. 3.

overt deed or act, affirm or set forth, that the king is not, or ought not to be, supreme head in earth of the Church of England and Ireland, or of any of them, immediately under God; or that the bishop of Rome, or any other person than the king of England for the time being, is, or ought to be, by the laws of God or otherwise, the supreme head in earth of the same churches or any of them; he (his aiders, comforters, abettors, procurers and counsellors) shall (on conviction by the oath of two witnesses or confession) be guilty of high treason."

Sect. 19. "But no person shall be prosecuted for the said offences by *open preaching or words only*, unless accused within thirty days after such preaching or speaking, if the accusers be within the realm during the said thirty days; if not, then within six months after such preaching or words spoken; and not otherwise: and the accusation to be made to one of the king's counsel, or to a justice of assize, or a justice of the peace being of the quorum, or to two justices of the peace within the shire where the offence was committed."

But as to offences made treason by this act, the same is so far repealed, by the 1 Mary, sess. 1, c. 1, which enacteth, that no offence made high treason by act of parliament shall be adjudged high treason, but only such as is expressed in the statute of the 25 Edw. 3. But as to the rest this statute continueth in force.

But by the 1 Eliz. c. 1, s. 16, it is further enacted as followeth; viz. "that no foreign prince, person, prelate, state, or potentate spiritual or temporal, shall use, enjoy or exercise any manner of power, jurisdiction, superiority, authority, preheminance or privilege, spiritual or ecclesiastical, within this realm, or any other her majesty's dominions or countries; but the same shall be abolished thereout for ever: any statute, ordinance, custom, constitutions, or any other matter or cause whatsoever to the contrary notwithstanding."

Sect. 17. "And such jurisdictions, privileges, superiorities and preheminences spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority have heretofore been, or may lawfully be exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order and correction of the same, and of all manner of errors, heresies, schisms, abuses, offences, contempts and enormities, shall for ever be united and annexed to the imperial crown of this realm."

Sects. 27, 30. "And if any person shall by *writing, printing, teaching, preaching, express words, deed or act*, advisedly, maliciously and directly affirm, hold, stand with, set forth, maintain or defend the authority, preheminance, power or jurisdiction, spiritual or ecclesiastical, of any foreign prince, prelate, person, state or potentate whatsoever, heretofore claimed, used or usurped within this realm, or any other her majesty's domi-

nions or countries; or shall advisedly, maliciously and directly put in ure or execute any thing, for the extolling, advancement, setting forth, maintenance or defence of any such pretended or usurped jurisdiction, power, preheminance and authority, or any part thereof; he, his abettors, aiders, procurers and counsellors, shall for the first offence forfeit all his goods, and if he hath not goods to the value of 20*l.*, he shall also be imprisoned for a year, and the benefices of every spiritual person offending shall also be void; for the second offence shall incur a *præmunire*; and for the third shall be guilty of high treason."

Sect. 31. "But no person shall be molested for any offence committed only by *preaching, teaching, or words*, unless he be indicted within one half-year after the offence committed."

Sect. 37. "And no person shall be indicted or arraigned but by the oath of two or more witnesses: which witnesses, or so many of them as shall be living, and within the realm at the time of the arraignment, shall be brought face to face before the party arraigned if he require the same."

Penalty for
asserting the
Pope's
Supremacy.

5 Eliz. c. 1, s. 2. "If any person shall by *writing, cyphering, printing, preaching or teaching, deed or act*, advisedly and wittingly, hold or stand with, to extol, set forth, maintain or defend the authority, jurisdiction or power, of the bishop of Rome or of his see, heretofore claimed, used or usurped, within this realm, or in any of her majesty's dominions; or by *any speech, open deed or act*, advisedly and wittingly attribute any such manner of jurisdiction, authority or preheminance, to the said see of Rome, or to any bishop of the same see for the time being; he, his abettors, procurers and counsellors, his aiders, assistants and comforters, upon purpose and to the intent to set forth, further and extol, the said usurped power, being indicted or presented within one year, and convicted at any time after, shall incur all the pains and forfeitures provided by the Statute of Provision and *Præmunire*, 16 Rich. 2, c. 25."

Sect. 3. "And the justices of assize, or two justices of the peace (one whereof to be of the quorum), in their sessions, may enquire thereof, and shall certify the presentment into the King's Bench in forty days, if the term be then open; if not, at the first day of the full term next following the said forty days: on pain of 100*l.*"

Sect. 4. "And the justices of the King's Bench, as well upon such certificate as by inquiry before themselves, shall proceed thereupon as in cases of *præmunire*."

Sect. 18. But charitable giving of reasonable alms to an offender, without fraud or covin, shall not be deemed abetting, procuring, counselling, aiding, assisting or comforting.

Oath of
Supremacy.

The papal encroachments upon the king's sovereignty in causes, and over persons ecclesiastical, yea, even in matters civil, under that loose pretence of *in ordine ad spiritualia*, had

obtained a great strength, and long continuance, in this realm, notwithstanding the security the crown had by the oaths of fealty and allegiance; so that there was a necessity to unrivet those usurpations, by substituting, by authority of parliament, a recognition by oath of the king's supremacy, as well in causes ecclesiastical, as civil; and thereupon the oath of supremacy was framed (r).

Which oath, as finally established by the 1 Will. 3, c. 8, is as follows:

"I, A. B., do swear, that I do from my heart abhor, detest, and abjure, as impious and heretical, that damnable doctrine and position, that princes excommunicated or deprived by the pope, or any authority of the see of Rome, may be deposed or murdered by their subjects, or any other whatsoever. And I do declare, that no foreign prince, person, prelate, state or potentate, hath, or ought to have, any jurisdiction, power, superiority, pre-eminence or authority, ecclesiastical or spiritual, within this realm: so help me God."

By the 31 Geo. 3, c. 32, s. 18, no person shall be summoned to take the oath of supremacy, or be prosecuted for not obeying such summons; but Roman Catholics, in order to enjoy the benefits of that act, for which see the title **Papery**, are to take, in the manner therein directed, the oath introduced by it; for which see title **Oaths**.

But lastly, the usurped jurisdiction of the pope being abolished, and there being no longer any danger to the liberties of the church or state from that quarter; and divers of the princes of this realm having entertained more exalted notions of the supremacy, both ecclesiastical and civil, than were deemed consistent with the legal establishment and constitution; it was thought fit, at the Revolution, to declare and express how far the regal power, in matters spiritual, as well as temporal, doth extend: that so as well the just prerogative of the crown on the one hand, as the rights and liberties of the subject on the other, might be ascertained and secured. Therefore by the statute of the 1 Will. 3, c. 6, it is enacted as followeth:

"Whereas by the law and ancient usage of this realm, the kings and queens thereof have taken a solemn oath upon the evangelists, at their respective coronations, to maintain the statutes, laws, and customs of the said realm, and all the people and inhabitants thereof in their spiritual and civil rights and properties; but forasmuch as the oath itself, on such occasion administered, hath heretofore been framed in doubtful words and expressions, with relation to ancient laws at this time unknown; to the end therefore that one uniform oath may be in all times to come taken by the kings and queens of this realm, and to them respectively administered, at the times of their and every of their coronation, it is enacted that the following oath shall be administered to every king or

Supremacy limited and defined by the Acts of Settlement at the Revolution.

(r) 1 H. H. 75.

queen who shall succeed to the imperial crown of this realm, at their respective coronations, by one of the archbishops or bishops of this realm of England for the time being, to be thereunto appointed by such king or queen respectively, and in the presence of all persons that shall be attending, assisting, or otherwise present at such their respective coronations; that is to say,

“ The archbishop or bishop shall say, ‘ Will you solemnly promise and swear to govern the people of the kingdom of England and the dominions thereto belonging, according to the statutes in parliament agreed on, and the laws and customs of the same?’ The king or queen shall say, ‘ I solemnly promise so to do.’

“ Archbishop or bishop: ‘ Will you to your power cause law and justice in mercy to be executed in all your judgments?’ The king or queen shall answer, ‘ I will.’

“ Archbishop or bishop: ‘ Will you to the utmost of your power maintain the laws of God, the true profession of the gospel, and Protestant reformed religion established by law? And will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them or any of them?’ The king or queen shall answer, ‘ All this I promise to do.’ After this, laying his or her hand upon the holy gospels, he or she shall say, ‘ The things which I have here before promised I will perform and keep: So help me God.’ And shall then kiss the book.”

And by the 1 W., sess. 2, c. 2, “ Whereas the late king James the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom:

“ 1. By assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of parliament.

“ 2. By committing and prosecuting divers worthy prelates, for humbly petitioning to be excused from concurring to the said assumed power.

“ 3. By issuing and causing to be executed a commission under the great seal for erecting a court called the court of commissioners for ecclesiastical causes.

“ 4. By levying money for and to the use of the crown, by pretence of prerogative, for other time and in other manner than the same was granted by parliament.

“ 5. By raising and keeping a standing army within this kingdom in time of peace, without consent of parliament, and quartering soldiers contrary to law.

“ 6. By causing several good subjects, being protestants, to be disarmed at the same time when papists were both armed and employed, contrary to law.

“ 7. By violating the freedom of election of members to serve in parliament.

“ 8. By prosecutions in the Court of King's Bench for matters and causes cognizable only in parliament, and by divers other arbitrary and illegal courses.

“ 9. And whereas of late years, partial, corrupt, and unqualified persons have been returned and served on juries in trials, and particularly divers jurors in trials for high treason, which were not freeholders.

“ 10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects.

“ 11. And excessive fines have been imposed, and illegal and cruel punishments inflicted.

“ 12. And several grants and promises made of fines and forfeitures, before any conviction or judgment against the persons upon whom the same were to be levied.

“ All which are utterly and directly contrary to the known laws and statutes and freedom of this realm.

“ And whereas the said late king James the Second having abdicated the government, and the throne being thereby vacant, his highness the Prince of Orange (whom it hath pleased Almighty God to make the glorious instrument of delivering this kingdom from popery and arbitrary power) did, by the advice of the lords spiritual and temporal, and divers principal persons of the commons, cause letters to be written to the lords spiritual and temporal being protestants, and other letters to the several counties, cities, universities, boroughs, and cinque ports, for the choosing of such persons to represent them as were of right to be sent to parliament, to meet and sit at Westminster upon the 22nd day of January in this year 1688, in order to such an establishment as that their religion, laws, and liberties might not again be in danger of being subverted: upon which letters elections having been accordingly made, and thereupon the said lords spiritual and temporal and commons, pursuant to their respective letters and elections, being now assembled in a full and free representation of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place, (as their ancestors in like cases have usually done,) for the vindicating and asserting their ancient rights and liberties, declare:

“ 1. That the pretended power of suspending laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

“ 2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.

“ 3. That the commission for erecting the late court of com-

missioners for ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious.

“ 4. That levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament, for longer time or in other manner than the same is or shall be granted, is illegal.

“ 5. That it is the right of the subjects to petition the king; and all commitments and prosecutions for such petitioning are illegal.

“ 6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

“ 7. That the subjects which are protestants may have arms for their defence, suitable to their conditions, and as allowed by law.

“ 8. That election of members of parliament ought to be free.

“ 9. That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

“ 10. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

“ 11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.

“ 12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void.

“ 13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently.

“ And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties; and that no declarations, judgments, doings, or proceedings, to the prejudice of the people in any of the said premises, ought in any wise to be drawn hereafter into consequence or example.”

The truth is, that after the abolition of the papal power there was no branch of sovereignty with which the princes of this realm, for above a century after the Reformation, were more delighted than that of being the supreme head of the church; imagining (as it seemeth) that all that power which the pope claimed and exercised (so far as he was able) was by the statutes abrogating the papal authority annexed to the imperial crown of this realm; not attending to the necessary distinction, that it was not that exorbitant, lawless power which the pope usurped that was thereby become vested in them; but only that the ancient legal authority and jurisdiction of the kings of England in matters ecclesiastical, which the pope had

endeavoured to wrest out of their hands, was re-asserted and vindicated. The pope arrogated to himself a jurisdiction superior not only to his own canon law, but to the municipal laws of kingdoms. And those princes of this realm above mentioned seem to have considered themselves plainly as popes in their own dominions. Hence one reason why a reformation of the ecclesiastical laws was never effected, seemeth to have been because it conduced more to the advancement of the supremacy to retain the church in an unsettled state, and consequently more dependent on the sovereign will of the prince. Hence became established the office of lord vicegerent in causes ecclesiastical; and after that, the high commission court; and last of all, the dispensing power, or a power of dispensing with or suspending the execution of laws at the prince's pleasure. Therefore, to remove these grievances, these acts prescribed the just boundaries of the prerogative, both ecclesiastical and civil, and established the rights both of prince and people upon the firmest and surest foundation, namely, the known law of the land; and thereby rendered the name of an English monarch respectable among the princes of the earth. A king ruling by the established laws of his kingdom, that is, with an extensive power of doing right, and an utter inability of doing wrong, is the perfection of the human nature, and the glory of the divine, and renders kings, in a most emphatical sense, God's vicegerents.

From which premises may be deduced also the genuine cause why the civil and canon laws have received so much check and discouragement from time to time within this kingdom. They are founded upon the principles of arbitrary power.

The civil law is said to be the common municipal law of all the arbitrary states in Europe (modified only according to the different circumstances of each government); and those princes of this realm who have most affected absolute sovereignty have been proportionable encouragers of the civil law. The canon law hath the same lineaments and features, being framed to render the pope in the church what the emperor was in the state. And it must be owned they are both perhaps more for the ease of the governors, but not so convenient for the governed.

Particularly as to the enacting part: they owe their very existence to the sovereign will of the supreme governor; and consequently, what is law to-day may not be law to-morrow; for the same power which enacteth may repeal. "For such is our will," is a harsh and grating sound to an English ear, being the sullen voice of insolence and wanton power. How much more humane is that declaration—"Be it enacted by the king's most excellent majesty, by and with the advice and assent of the lords spiritual and temporal, and commons, in

this present parliament assembled, and by the authority of the same."

Again, as to the executive part, especially with respect to criminal prosecutions. A person accused in the dark ; witnesses not confronted with the party face to face ; the cruel oath *ex officio*, whereby a man is compelled to accuse himself (not to mention the diabolical rack and torture) ; and the whole determined at last by the sole decision of the judge, who must needs be oftentimes an entire stranger to the parties ; are disparagements to those laws which will always obstruct their progress in a land of liberty. How much more mild and gentle is that law which is the birthright of every Englishman, however otherwise destitute and friendless, whereby he shall not be called upon to answer for any crime he is charged withal, but upon the oaths of at least twelve men of considerable rank and fortune within the county in which the offence is supposed to have been committed, if they shall see probable cause for further inquiry ; and afterwards shall not be condemned, but by the unanimous suffrage of other twelve men, his neighbours and equals in degree and station of life, upon their oaths likewise ; and at the same time he hath a right to object to any one who is summoned to try him for his offence, if he hath a reasonable cause of exception. The one is the law of tyrants, the other of freemen—and may it ever prosper in the British soil !

By the Act of Union of the two Kingdoms of England and Scotland.

Finally, by the act of union of the two kingdoms of England and Scotland, 5 Ann. c. 8, it is enacted, that after the demise of her majesty Queen Anne, the sovereign next succeeding, and so for ever afterwards every king or queen succeeding and coming to the royal government of the kingdom of Great Britain, at his or her coronation, shall, in the presence of all persons who shall be attending, assisting, or otherwise then and there present, take and subscribe an oath to maintain and preserve inviolably the settlement of the Church of England, and the doctrine, worship, discipline, and government thereof, as by law established within the kingdoms of England and Ireland, the dominion of Wales, the town of Berwick-upon-Tweed, and the territories thereunto belonging.

And shall also swear and subscribe that they shall inviolably maintain and preserve the settlement of the true Protestant religion, with the government, worship, discipline, right, and privileges of the Church of Scotland, as then established by the laws of that kingdom. [See titles *Church in England and Ireland, in Scotland, Popery, and Dissenters.*]

Surgeons—See **Physicians**.

Surplice—See **Church**, and **Public Worship**.

Surrogate.

BY canon 128, no chancellor, commissary, archdeacon, official, or any other person using ecclesiastical jurisdiction, shall substitute in their absence any to keep court for them, except he be either a grave minister and a graduate, or a licensed public preacher, and a beneficed man near the place where the courts are kept, or a bachelor of law, or a master of arts at least, who hath some skill in the civil and ecclesiastical law, and is a favourer of true religion, and a man of modest and honest conversation; under pain of suspension for every time that they offend therein, from the execution of their offices, for the space of three months *toties quoties*: and he likewise that is deputed, being not qualified as is before expressed, and yet shall presume to be a substitute to any judge, and shall keep any court as aforesaid, shall undergo the same censure in manner and form as is before expressed.

And by the statute of the 26 Geo. 2, c. 33, no surrogate deputy by any ecclesiastical judge, who hath power to grant licences of marriage, shall grant any such licence before he hath taken an oath before the said judge, faithfully to execute his office according to law, to the best of his knowledge; and hath given security by his bond in the sum of 100*l.* to the bishop of the diocese, for the due and faithful execution of his office.

[The authority of a surrogate cannot of course exceed that of his principal (*t*).—ED.]

His office and duty in granting such licences is treated of in the title **Marriage**.

[So, by 10 Geo. 4, c. 53, it is enacted, that the surrogates of the Arches and Consistory of London are to continue, after the death of such judges, till the new appointments are made (*u*).—ED.]

Suspension (*x*).

IN the laws of the church, we read of two sorts of suspension; Two kinds. one relating solely to the clergy, the other extending also to the laity (*y*).

That which relates solely to the clergy, is suspension from office and benefice jointly, or from office or benefice singly; and may be called a temporary degradation, or deprivation of both. Deprivation. So we find it described by John of Athon: a person *deposed*, is he who is deprived of his office and benefice, although not solemnly; a person *degraded*, is he who is deprived of both Degradation. solemnly, the ensigns of his order being taken from him; a

(*t*) [*Balfour v. Carpenter*, 1 Philim. 205.]

(*u*) [See *Practice*, p. 229 of this vol.]

(*x*) [For non-residence, see title **Privileges and Restraints of the Clergy**.]

(*y*) *Gibs.* 1047.

person *suspended*, is he who is deprived of them both for a time, but not for ever (z).

And the penalty upon a clergyman officiating after suspension, if he shall persist therein after a reproof from the bishop, is (by the ancient canon law) that he shall be excommunicated all manner of ways, and every person who communicates with him shall be excommunicated also (a).

By whom
Suspension
may be pro-
nounced.

[The difference between suspension and deprivation (b) consists in this, that the former may be pronounced by the chancellor of the diocese, the latter by the bishop alone (c).—ED.]

The other sort of suspension, which extendeth also to the laity, is suspension *ab ingressu ecclesiæ*, or from the hearing of divine service, and receiving the holy sacrament; which may therefore be called a temporary excommunication (d).

Parishioners
ab ingressu
Ecclesiæ.

[Very recent instances are furnished by the Reports of the Ecclesiastical Courts of parishioners suspended *ab ingressu ecclesiæ*, for brawling in a church, and in a vestry held in a room within the church; this sentence being attended by condemnation in costs of a sum *nomine expensarum* (e).—ED.]

Which two sorts of suspension, the one relating to the clergy alone, and the other to the laity also, do herein agree, that both are inflicted for crimes of an inferior nature, such as in the first case deserve not deprivation, and such as in the second case deserve not excommunication; that both, in practice at least, are temporary; both also terminated, either at a certain time when inflicted for such time, or upon satisfaction given to the judge when inflicted, until something be performed which he hath enjoined: and lastly, both (if unduly performed) are attended with further penalties; that of the clergy, with irregularity, if they act in the meantime; and that of the laity (as it seemeth) with excommunication, if they either presume to join in communion during their suspension, or do not in due time perform those things which the suspension was intended to enforce the performance of (f).

Previous Ad-
monition ne-
cessary.

By the ancient canon law, sentence of suspension ought not to be given without a previous admonition; unless where the offence is such, as in its own nature requires an immediate suspension: and if sentence of suspension, in ordinary cases, be given without such previous admonition, there may be cause of appeal (g).

The following is extracted from 1 T. Rep. 526, and there said to be taken from a manuscript book in the handwriting of Sir E. Simpson, formerly king's advocate and judge of the

(z) Gibs. 1047.

(a) *Ibid.*

(b) [Watson v. Thorp, 1 Phillim. 277.]

(c) [See titles *Arches* and *Practice*.]

(d) Gibs. 1047.

(e) [See brawling, under title *Church*, vol. i. p. 389; *Canning v. Sawkins*, 2 Phillim. 293; *Jarman v. Wise*, 3 Hagg. 360.]

(f) Gibs. 1047.

(g) Gibs. 1046.

admiralty. “ Offence — Undoubted rule in admiralty and ecclesiastical courts, that person suspended for an offence supposed, of which he is afterwards acquitted in proper court, is entitled to all the intermediate profits. Thus, in case of capture of prize at sea, the officer in arrest being actually on board, and afterwards duly acquitted, or restored to his station, shall share the prize-money. So in civil causes in admiralty: if a master turns his mate without just cause before the mast, and he sue for wages as mate for the whole time, he may recover, though he did not do the duty. So if a clergyman be suspended *ab officio et beneficio*, and upon an appeal declared innocent, he will recover the profits of the living.

Intermediate Profits between Charge and Acquittal.

“ Profits—Person suspended from an office, entitled to intermediate profits, if innocent (*h*).”

Swearing (*i*).

CANON 109. “ If any offend their brethren by swearing, the churchwardens or questmen and sidemen, in their next presentment to their ordinaries, shall present the same, that they may be punished by the severity of the laws, according to their deserts: and such notorious offenders shall not be admitted to the holy communion till they be reformed.”

By the Canon Law.

By the 19 Geo. 2, c. 21, s. 1, if any person shall profanely curse or swear, and be thereof convicted on the oath of one witness before one justice of the peace or mayor of a town corporate, or by confession; every person so offending shall forfeit as followeth: that is to say, every day labourer, common soldier, common sailor, and common seaman, 1s.; and every other person under the degree of a gentleman, 2s.; and every person of or above the degree of a gentleman, 5s. And if any person after conviction offend a second time, he shall forfeit double; and for every other offence after a second conviction, treble.

Sect. 2. “ And if such profane cursing or swearing shall be in the presence and hearing of a justice of the peace, or in the presence or hearing of such mayor as aforesaid, he shall convict the offender without other proof.”

Sect. 3. “ And if it shall be in the presence and hearing of a constable or other peace officer, he shall (if such person be unknown to him) seize, secure, and detain him, and forthwith carry him before the next justice of the peace for the county or division, or before the mayor of such town corporate, wherein the offence was committed; who shall on the oath of such constable or other peace officer convict the offender; but if such

(*h*) [See titles *Archdeaconry, Deposition, Clergy.—ED.*
Privileges and Restraints of the (*i*) [See title *Oaths*.]

person be known to the said constable or other peace officer, he shall speedily make information before such justice or mayor, that the offender may be by him convicted."

Sect. 4. "And such justice or mayor shall immediately, upon information given upon oath of such constable or other peace officer, or of any other person whatsoever, cause the offender to appear before him; and upon such information being proved as aforesaid, shall convict him. And if he shall not immediately pay down the sum so forfeited, or give security to the satisfaction of such justice or mayor before whom the conviction is made, such justice or mayor shall commit the offender to the house of correction, there to remain and be kept to hard labour for the space of ten days."

Sect. 5. "Provided, that if any common soldier belonging to any regiment in his majesty's service, or any common sailor or common seaman belonging to any ship or vessel, shall be convicted of profane cursing or swearing as aforesaid, and shall not immediately pay down the penalty or give security for the same as aforesaid, and also the costs of the information, summons, and conviction, as by this act is directed; he shall, instead of being committed to the house of correction, be ordered by such justice or mayor to be publicly set in the stocks for the space of one hour for every single offence, and for any number of offences whereof he shall be convicted at one and the same time two hours."

Sect. 6. "And if such justice or mayor shall wilfully and wittingly omit the performance of his duty, in the execution of this act, he shall forfeit 5*l.*, half to the informer and half to the poor of the parish where he shall reside; to be recovered in any of his majesty's courts of record at Westminster."

Sect. 7. "And if any constable or other peace officer shall wilfully and wittingly omit the performance of his duty in the execution of this act, and be thereof convicted by the oath of one witness, before one justice or mayor as aforesaid, he shall forfeit 40*s.* to be levied and recovered by distress and sale, and to be disposed of half to the informer and half to the poor; and if he have not sufficient goods whereon to levy the same, such justice or mayor shall commit him to the house of correction, to be kept to hard labour for one month."

Sect. 8. "And the conviction shall be drawn up in the words and form following:

Middlesex } *Be it remembered, that on the — day of — in the*
to wit. } *— year of his majesty's reign, A. B. was convicted*
before me one of his majesty's justices of the peace for the county,
riding, division, or liberty aforesaid, [or "before me, mayor, justice,
bailiff, or other chief magistrate of the city or town of —, within
the county of —," as the case shall be] of swearing one or more
profane oath or oaths, [or "of cursing one or more profane curse or
curses," as the case shall be]. Given under my hand and seal the
day and year aforesaid.

Which said form and conviction shall not be liable to be removed by *certiorari*, but shall be final to all intents. And the said justice or mayor before whom the conviction shall be shall cause the same to be fairly wrote upon parchment, and returned to the next general or quarter sessions of the peace for the county, to be filed by the clerk of the peace, and kept amongst the records."

Sect. 10. "The penalties to be disposed of for the benefit of the poor; and all charges of the information and conviction shall be paid by the offender if able, over and above the penalties; which charges shall be settled and ascertained by such justice or mayor (so as that the clerk of such justice or mayor shall have for the information, summons, and conviction of every offender, the sum of 1s. and no more; s. 14.) And if such party shall not be able, or shall not immediately pay the said charges and expenses, or give security for the same to the satisfaction of such justice or mayor, he shall commit him to the house of correction, there to remain and be kept to hard labour for the space of six days, over and above such time for which he may be committed in default of payment of the penalties; and in such case no charges of information and conviction shall be paid by any person whatsoever."

Sect. 11. "And if any action shall be brought against any justice of the peace, constable, or any other person whatsoever, for any thing done in execution of this act, he may plead the general issue, and give the special matter in evidence; and if a verdict shall be given for him, or the plaintiff be nonsuit, or discontinue, he shall have treble costs."

Sect. 12. "Provided, that no person shall be prosecuted or troubled for any offence against the statute, unless the same be proved or prosecuted within eight days next after the offence committed."

Sect. 13. "And this act shall be publicly read four times a year in all parish churches and public chapels, by the parson, vicar, or curate, immediately after morning or evening prayer, on four several Sundays, to wit, the Sunday next after March 25, June 24, September 29, and December 25, or in case divine service shall not be performed in any such church or chapel on such Sunday, then upon the first Sunday after: on pain of forfeiting 5*l.* for every omission or neglect, to be levied by distress and sale of the offender's goods, by warrant from such justice or mayor."

And by the 22 Geo. 2, c. 33, art. 2, "All flag officers, and all persons in or belonging to his majesty's ships or vessels of war, being guilty of profane oaths, cursings, execrations, or other scandalous actions, in derogation of God's honour, and corruption of good manners, shall incur such punishment as a court martial shall think fit to impose, and as the nature and degree of their offence shall deserve."

[**Synod**--See **Councils.**]

Synodals.

SYNODALS and *synodaticum*, by the name, have a plain relation to the holding of synods; but there being no reason why the clergy should pay for their attending the bishop in synod, pursuant to his own citation, nor any footsteps to be found of such a payment by reason of the holding of synods, the name is supposed to have grown from this duty being usually paid by the clergy when they came to the synod. And this, in all probability, is the same which was anciently called *cathedraticum*, as paid by the parochial clergy, in honour to the episcopal chair, and in token of subjection and obedience thereto. So it stands in the body of the canon law. "No bishop shall demand any thing of the churches but the honour of the *cathedraticum*, that is, two shillings" (at the most, saith the gloss, for sometimes less is given). And the duty which we call synodals, is generally such a small payment: which payment was reserved by the bishop, upon settling the revenues of the respective churches on the incumbents; whereas before, those revenues were paid to the bishop, who had a right to part of them for his own use, and a right to apply and distribute the rest, to such uses, and in such proportions, as the laws of the church directed (*k*).

Synodals are due of common right to the bishop only. So that if they be claimed or demanded by the archdeacon, or dean and chapter, or any other person or persons, it must be upon the foot of composition or prescription (*l*).

And if they be denied where due, they are recoverable in the spiritual court. And in the time of Archbishop Whitgift they were declared, upon a full hearing, to be spiritual profits; and, as such, to belong to the keeper of the spiritualties *sede vacante* (*m*).

Also constitutions made in the provincial or diocesan synods, were sometimes called *synodals*; and were in many cases required to be published in the parish churches: in which sense the word frequently occurreth in the ancient directories.

[**Taxes**--See **Privileges and Restraints of the Clergy**, and **Tithes.**]

Templars--See **Monasteries.**

(*k*) Gibs. 976.

(*l*) Ibid.

(*m*) Gibs. 977.

Temporalities (of Bishoprics)—See **Bishops**.

Tenths—See **First Fruits**.

Terrier.

BY Canon 87, "The archbishops and all bishops within their several dioceses shall procure (as much as in them lieth) that a true note and terrier of all the glebes, lands, meadows, gardens, orchards, houses, stocks, implements, tenements, and portions of tithes lying out of their parishes, which belong to any parsonage, vicarage, or rural prebend, be taken by the view of honest men in every parish, by the appointment of the bishop, whereof the minister to be one; and to be laid up in the bishop's registry, there to be for a perpetual memory thereof."

It may be convenient also to have a copy of the same exemplified, to be kept in the church chest (*n*).

These terriers are of greater authority in the ecclesiastical courts than they are in the temporal; for the ecclesiastical courts are not allowed to be courts of record: and yet even in the temporal courts these terriers are of some weight, when duly attested by the register (*o*).

Especially if they be signed, not only by the parson and churchwardens, but also by the substantial inhabitants; but if they be signed by the parson only, they can be no evidence for him; so neither (as it seemeth) if they be signed only by the parson and churchwardens, if the churchwardens are of his nomination. But in all cases they are certainly strong evidence against the parson (*p*).

Terriers, though signed by the churchwardens only, are admissible as evidence, and they are also admissible against the rector, though signed by none claiming under or acting for him (*q*).

[Terriers alone are not sufficient to prove a *modus* (*r*).

Form of a Terrier.

A true note and terrier of all the glebes, lands, meadows, gardens, orchards, houses, stocks, implements, tenements, portions of tithes, and other rights, belonging to the vicarage and parish church of Orton, otherwise Overton, in the county of Westmoreland, and diocese of Carlisle, now in the use and possession of Richard Burn, clerk, vicar of the said

(*n*) God. Append. 12.

(*o*) Johns. 242.

(*p*) Theory of Evidence, 45. So ruled by the Court of King's Bench in *Miller v. Foster*, 1794, contrary to the opinion of Macdonald, Ch. B.,

1 Anstr. 387. See also *Atkyns v. Hatton*, ib.

(*q*) *Illingworth v. Leigh*, 4 Gwill. 1615.

(*r*) [1 Jac. & W. 20.]

church; taken, made, and renewed according to the old evidences and knowledge of the ancient inhabitants, this tenth day of November, in the year of our Lord one thousand seven hundred and forty-nine, by the appointment of the right reverend father in God Richard Lord Bishop of Carlisle, at his primary visitation held at Appleby in the said county and diocese aforesaid, the eighth day of June in the same year, and exhibited before the reverend and worshipful John Waugh, doctor of laws, chancellor of the aforesaid diocese, on the twentieth day of November in the year aforesaid.

Imprimis, One stated dwellinghouse, in length fifty-one feet, in breadth nineteen feet, within the walls. One thatched barn, stable, cow house, and peat house, contiguous to each other under the same roof; in length eighty-one feet, in breadth twenty-one feet, without the walls. One other little stable, in length thirteen feet, in breadth twelve feet and a half; adjoining to the peat house at the south west side and end. *Item*, The churchyard, containing three roods and nineteen perches; adjoining to the grounds of Robert Teasdale on the south, of Richard Alderson on the west and north, and to a close belonging to the said vicarage, called Prior Garth, on the east: The walls and gates thereof round about made by the parish. *Item*, One inclosure called Prior Garth, containing three roods and seven perches; adjoining to the church lane on the south, to the churchyard on the west, to the ground of Richard Alderson on the north, and to the highway on the east: Through which there lies a footpath from the vicarage house to the church, but for no other purpose: The wall and hedge on the south, north, and east made by the vicar; and on the west, where it adjoins to the churchyard, by the parish. *Item*, one garden, containing one rood and eleven perches; adjoining to the vicarage garth, and to the ends of the barn and of the dwelling house, on the south; to the highway on the west, and north; and to the said garth on the east: The fence round about made by the vicar. *Item*, One parroch, containing twenty-four perches and a half: adjoining to Orton Green on the south, to the highway on the west, to the end of the dwelling house on the north, and to the vicarage garth on the east: The fence round about made by the vicar. *Item*, One garth, containing one acre, fifteen perches and a half; adjoining to the grounds of John Powley, Daniel Teasdale, and Orton Green on the south; to the said parroch, barn, and garden on the west; to the peat house end, garden, and highway on the north; and to a close belonging to the said vicarage, called Corn Close, on the east: The fence round about made by the vicar, except that John Powley makes the fence where it adjoins to his ground, and Daniel Teasdale from thence to the bottom of the old lime kiln: Through which garth lies a foot-path for the said John Powley and Daniel Teasdale to and from their said grounds, and likewise a driving way for their sheep; which they frequented whilst the common field was uninclosed, but is now become almost useless. *Item*, One inclosure, called Corn Close, containing one acre, one rood, and twenty-one perches; adjoining to the said John Powley's Lane, and to a piece of ground before his barn called a flee-room, and to his garth on the south; to the vicar's said garth on the west: to the highway on the north; and to the highway and John Powley's Lane on the east: The fence all about made by the vicar, except where it adjoins to John Powley's garth and barn. All which said corn, close, garth, garden, and parroch, have been inclosed ground for time immemorial,

and the vicar in respect thereof hath not repaired any part of the highways adjoining thereunto. Opposite to the same, on the north side, is an inclosure made by Daniel Teasdale, about nine years ago, by which the highway was made into a lane. Item, One inclosure called Fore Dale, containing three acres and fifteen perches; adjoining to the grounds of Robert Teasdale and John Nelson on the south, of John Nelson on the west, of John Powley and Robert Teasdale on the north, and of Robert Teasdale on the east: All the fence made by the vicar, except where it adjoins to the said John Nelson's in-croft, and except half the length of the said John Nelson's outcroft, from the middle to the east end, the said John Nelson's fence being stone wall: From the east end of which inclosure lies a way through Robert Teasdale's ground, which the present incumbent purchased of the said Robert Teasdale, to an inclosure belonging to the said vicar (but not to the vicarage), called Long Roods; which is to continue for ever, and may be of use if at any time hereafter the said two inclosures (Fore Dale and Long Roods) shall be occupied by the same person, or otherwise. Item, One other inclosure, called the Greater Mil-Brow, containing one acre, three roods, and seven perches; adjoining to the ground of John Powley on the south, to a tillage way enjoyed and repaired by the said vicar on the west, to the ground of Thomas Ireland on the north, and of John Powley on the east: All the fence made by the vicar, except about sixteen yards of stone wall at the north-east end, belonging to John Powley. Item, One other inclosure, called Little Mil-Brow, containing twenty-eight perches; adjoining to the ground of John Powley on the south, of Isabel Atkinson on the west, of Isabel Atkinson and Thomas Ireland on the north, and the said tillage way on the east: The fence all made by the vicar: Through the south-west corner of which inclosure is the ancient watercourse. The said three last inclosures were made out of the common field by the present incumbent. Item, One other inclosure, called Glebe Close, lying at Firbiggins, containing eight acres and three roods; adjoining to the ground of Elizabeth Turner on the south, of Elizabeth Turner and William Thwaytes on the west, of William Thwaytes on the north, and to the common on the east: The wall at the east end is made by the vicar, at the west end by Elizabeth Turner and William Thwaytes: The right of repairing the fence on the north side, and on the south side is in dispute, and not yet determined. At the end of Elizabeth Turner's house, an oak gate is to be maintained by the owners of Coat Garth, for which they enjoy a liberty of ingress and egress for themselves and families, and liberty of driving cattle in the winter, from Martinmas to Lady-day, doing as little damage as may be; and of passing with peats or other firing in summer. Belonging to the said glebe close, and occupied therewith, there is likewise a parcel of ground, leading from the said gate at Elizabeth Turner's house end, north-eastward to the said glebe close, having the wall on the left hand, and meted out from Elizabeth Turner's ground on the right, in breadth three yards or upwards, being the way to and through the said glebe close. Item, Another parcel of ground, in the common field, called North Lands, containing two roods and five perches; adjoining to the ground of Robert Teasdale on the south, of John Nelson on the west and north, and of Robert Teasdale on the east. Item, Another parcel of ground in the common field, called Pot-Lands Head, containing one rood; adjoining to the ground of Robert Teasdale on the south, of Elizabeth Waller on the west down

by the runner, of John Nelson on the north, and of Robert Teasdale on the east. All which said lands, containing in the whole nineteen acres and upwards, are situate within the lordship and manor of Orton, free from the payment of any fines, rents, or services to any chief lord: the royalties of which said lands are also in the vicar. Item, A parcel of peat moss in Orton Low Moor, containing by estimation ten acres, known by the name of the Vicar's Moss.

Item, to the said vicarage is also belonging the tithe of wool throughout the parish; and the manner of tithing is this: the owner lays his whole year's produce in five parcels or heaps; the vicar, or person employed by him, chooseth one of the five heaps, which he pleaseth, and divides the same into two parts; of which two parts the owner chooseth one, and leaves the other to the vicar for his tenth part. Item, the tithe of lambs in their proper kind throughout the parish; and the custom concerning them is this: if a person's number is one, he pays a penny; if two, he pays twopence; if three, he pays threepence; if four, he pays fourpence; if five, he pays half a lamb; if six, a whole lamb, the vicar paying back four pence; if seven, threepence; if eight, twopence; if nine, one penny; if ten, the vicar hath a lamb complete: and in like manner for every number above ten. And if a man's number is under fifty, the tithe is taken thus: the owner takes up two, then the vicar takes one; next the owner takes nine, then again the vicar one; and so on till the vicar hath taken the number due to him: if they are fifty or upwards, they are put into a place together, and run out singly through a hole or gap; the two first that come out are the owner's, the third the vicar's, then the owner has the next nine, then the vicar one, and so on till the vicar hath his number. And if sheep are sold in the spring, the tithe of lambs is paid by the person with whom they were lambed, whether seller or buyer. Item, the tithe of geese, taken up about Michaelmas, in the same manner as the lambs, except that whereas a penny is paid on the account of each odd lamb, an halfpenny only is paid for each odd goose. Item, the tithe of pigs in like manner. Item, the tithe of eggs about Easter: two eggs for each old hen and duck, and one egg for each chicken and duck of the first year. Item, by every person who sows hemp is paid yearly one penny. Item, for each plough is paid yearly one penny. Item, by every person keeping bees is paid yearly one penny. Item, an oblation of fourpence at every churching of women. Item, for every wedding by publication of banns, one shilling; by licence, ten shillings. Item, for every funeral, without a sermon, sixpence. Item, mortuaries according to act of parliament. Item, for every person of age to communicate, three halfpence yearly, due at Easter. Item, a pension of twenty shillings yearly out of the rectory of Sedbergh, in the county of York. The glebe, tithes, and profits of the vicarage, are worth, at the improved value, communibus annis, about ninety pounds a year.

There is also due to the parish clerk, for every family keeping a separate fire, threepence yearly; for every wedding by publication, or by licence, one shilling; for every funeral, sixpence; for every proclamation in the churchyard, twopence.

To the sexton for making a grave, sixpence.

Belonging to the said parish are, first, the parish church, an ancient building, containing in length (with the chancel) ninety-six feet, in breadth forty-eight feet; the chancel in breadth, one part thirty feet,

the other part twenty-one feet ; the steeple fifteen feet square within the walls, in height sixty feet. Within and belonging to which are one communion table, with a covering for the same of green cloth ; also one linen cloth for the same, with two napkins ; two pewter flaggons ; two silver chalices, weighing about ten ounces each ; one paten ; one bason for the offertory ; one table of degrees ; one chest with three locks, in the vestry, of little use because of the damp ; one pulpit and reading desk, made in the year 1742 ; one pulpit cushion, covered with green cloth ; one large Bible of the last translation ; two large Common Prayer Books ; the book of homilies ; Comber on the Common Prayer, and Tillotson's first volume of sermons, given by Mr. Thomas Hastwell, merchant in London, 1703 ; the king's arms, with the ten commandments ; one church clock ; four bells with their frames,—the first or least bell being two feet seven inches and a half in diameter, with this inscription, " Jesus be our speed, 1637 ;" the second, two feet and eleven inches in diameter, with an ancient inscription, " Omnium Animarum," perhaps by a mistake of the bell-founder for " Omnium Sanctorum," to whom the church is dedicated ; the third, three feet and two inches in diameter, with this inscription, " Soli Deo Gloria, 1637 ;" the fourth, or largest, three feet six inches and a half in diameter, with this inscription, " Mr. Thomas Nelson, vicar, John Bowness, John Winter, 1711 ;" two biers ; one herse-cloth ; two surplices ; three parchment register-books ; one beginning in 1596, and ending in 1646, imperfect ; the second beginning in 1654, and ending 1743, complete ; the third beginning 1743, and continued to the present time. The seats in the church and chancel (except the vicar's pew) have been repaired for time immemorial at the public expense of the parish. There are also several new common seats erected this year by the churchwardens, at the low end of the church adjoining to the belfry. There is also belonging to the said parish the rectory thereof, together with the tithes of corn, hay, calves, milk, and other dues, which did formerly belong to the priory of Conieshead in Lancashire, and after the dissolution of monasteries were purchased by the inhabitants. Also the advowson of the vicarage, which did belong to the said priory, and was likewise purchased with the rectory. Also one box with three locks, in the keeping of John Unthank of Orton ; in which are the purchase deeds of the rectory and advowson, a copy of the endowment of the vicarage in 1263, the purchase deeds of the manors of Orton and Raisbeck by the inhabitants, bounder rolls and other public writings. There is also belonging to the said parish, one inclosure in the lordship of Raisbeck, called Barrough Close, containing by estimation fifteen acres, of the yearly rent of six pounds ; adjoining to the river Lune on the south, to the ground of Thomas Fothergill on the west, to the common to the north, and to the grounds of Leonard Scaife on the west ; the fence on the south made by the parish ; on the west by the parish and Thomas Fothergill, each a part ; on the north by the parish ; and on the east by the parish and Leonard Scaife, each a part. Also the sum of twenty pounds in the hands of Thomas Winter of Wood-end, given by John Dalston, esquire, of Acornbank. Also the sum of three pounds ancient poor stock, in the hands of the administrators of the late George Overend of Raisbeck. Also the sum of ten pounds, now in the hands of the vicar, given by Daniel Wilson, esquire, of Dalham Tower. Also the sum of five pounds, in the hands of Mr. Edward

Branthwaite of Carlingill, given by him towards a fund for the poor stock. Also the sum of five pounds, in the hands of Thomas Hodgson of Tebay-gill Edge, given by Mr. Robert Harrison of Low Scailes, deceased, for the same purpose. The interest of which money, and the rent of which inclosure, are applied by the churchwardens and overseers of the poor, by the direction of the twelve, to the relief of the poor, and defraying other parish charges. Which said twelve men are chosen yearly in Easter week, at a vestry meeting, by a majority of votes, to be sidesmen and a select vestry for the year ensuing.

There are also three schools in the said parish. One at Orton, lately built by the inhabitants, and endowed by Agnes Holme of Orton, widow, with a parcel of land lying in Orton field, containing by estimation one acre, of the present yearly rent of ten shillings; adjoining to the grounds of Christopher Parker on the south, west, and east, and to land belonging to the vicarage of Burgh on the north: endowed also by Robert Wilson of Long Sleddale, yeoman, with the sum of five pounds, now in the hands of Thomas Green of Langdale. Another school at Tebay, founded by Robert Adamson of Blacket Bottom in Grayrigg, gentleman, in the year 1672, and endowed by him with the estates called Ormondie Biggin and Blacket Bottom in Grayrigg, now of the yearly rent of sixteen pounds. Another school at Greenholme, founded by George Gibson of Greenholme, gentleman, in the year 1733, and endowed by him with four hundred pounds original bank stock, of the yearly produce of about twenty-two pounds.

In testimony of the truth of the before-mentioned particulars, and of every of them, we, the minister, churchwardens, and principal inhabitants, have set our hands the tenth day of November, in the year of our Lord one thousand seven hundred and forty-nine.

Ri. Burn, Vicar.

Joseph Powley	}	Churchwardens.
John Bowness		
Edmund Dent		
Stephen Matthews		
George Wilson		
Will. Rowlandson		

John Unthank	}	Eleven of the Twelve, one of them being dead.
John Nelson		
John Bowness		
Robert Bowness		
John Wilson		
Jonathan Whitehead		
Edward Branthwaite		
Thomas Brown		
John Wilson		
William Atkinson		
John Farrer		

Note, in 2 *Dugd. Monast.* 424, there is a copy of a charter of King Edward the Second, confirming (amongst others) a grant which had been made to God and St. Mary and the house of Conyngesheved, and the confreres there, by Gamellus de Penigton, of the churches of Penigton and Molcastre, with

their chapels and other appurtenances, and of the church of Wytebec, and of the church of Skeroverton; so denominated from the Islandic skier, a scar, or rock, which word is still in use in the county of Lancaster; the town of Orton being situate under the mountain which still beareth the name of Orton-Scar.

Note, *Conynges-heved* is the same as the *king's head*; from the Saxon *cyning*, or *conyng*, which signifieth king, and *heafod*, head.

Tithes.

OBLATIONS, offerings, prestations, pensions, and other church dues not properly tithes, are treated of under their respective titles.

1. <i>Origin of Tithes in England</i>	679	<i>ration of the Tithe Commu-</i>	
2. <i>Their several kinds before the Tithe Commutation Acts</i>	680	<i>tation Acts</i>	713
3. <i>Of what Things Tithes were paid and of Exemptions before those Acts (r)</i>	684	11. <i>Rateability of Rent Charge</i>	717
4. <i>Account of those Acts</i>	697	12. <i>Other Incidents to</i>	723
5. <i>Of the Rent-charge substituted by them for Tithes</i>	700	13. <i>Rent Charge exchanged for or merged in Lands</i>	728
6. <i>Power to sell Farm Buildings</i>	707	14. <i>Mode of recovering Rent Charge</i>	732
7. <i>Rent Charge on Lammas Lands and Commons in Gross</i>	708	15. <i>And of Tithes by Landlord, where the Occupier has dissented to the Commutation</i>	737
8. <i>On Allotments in lieu of Right of Common</i>	709	16. <i>Of the setting out and carrying away of Tithes</i>	763
9. <i>Fruit and Hop Plantations</i>	ib.	17. <i>Tithes in London</i>	768
10. <i>Personal and Mineral Tithes and certain Offerings, how far exempted from the operation of the Tithe Commutation Acts</i>		18. <i>Leases of Tithes</i>	786
		19. <i>Forms of Apportionment, &c. under the Tithe Commutation Acts</i>	791

I. *Origin of Tithes in England (r).*

What was paid to the church for several of the first ages after Christ, was all brought to them by way of offerings; and these were made either at the altar, or at the collections, or else occasionally (s).

Afterwards, about the year 794, Offa king of Mercia (the most potent of all the Saxon kings of his time in this island), made a law, whereby he gave unto the church the tithes of all his kingdom; which, the historians tell us, was done to expiate

(r) [These three sections are left as historical introductions to the Tithe Commutation Acts.—Ep.]

(s) Prideaux on Tithes, 139. [See Thomassini Vetus et Nova Ecclesiæ Disciplina, vol.3, c.1, 2d ed.fol.—Ep.]

for the death of Ethelbert king of the East Angles, whom in the year preceding he had caused basely to be murdered (*t*).

But that tithes were before paid in England by way of offerings, according to the ancient usage and decrees of the church, appears from the canons of Egbert, Archbishop of York, about the year 750; and from an epistle of Boniface, Archbishop of Mentz, which he wrote to Cuthbert, Archbishop of Canterbury about the same time; and from the seventeenth canon of the general council, held for the whole kingdom at Chalchuth, in the year 787. But this law of Offa was that, which first gave the church a civil right in them in this land by way of property and inheritance, and enabled the clergy to gather and recover them as their legal due, by the coercion of the civil power (*u*).

Yet this establishment of Offa reached no further than to the kingdom of Mercia, over which Offa reigned; until Ethelwulph, about sixty years after, enlarged it for the whole realm of England (*x*).

II. *Their several kinds before the Tithe Commutation Acts.*

Division of
Tithes into
Prædial,
Mixt and
Personal.
Prædial.

Tithes, with regard to the several kinds or natures, are divided into *prædial*, *mixt* and *personal*.

Prædial tithes are such as arise merely and immediately from the ground; as grain of all sorts, hay, wood, fruits, herbs; for a piece of land or ground being called in Latin *prædium* (whether it be arable, meadow, or pasture), the fruit or produce thereof is called *prædial*, and consequently the tithe payable for such annual produce is called a *prædial* tithe (*y*).

Mixt.

Mixt tithes are those which arise not immediately from the ground, but from things immediately nourished by the ground, as by means of goods depastured thereupon, or otherwise nourished with the fruits thereof; as colts, calves, lambs, chickens, milk, cheese, eggs (*z*).

Personal.

Personal tithes are such profits as do arise by the honest labour and industry of man, employing himself in some personal work, artifice, or negociation; being the tenth part of the clear gain, after charges deducted (*a*).

Division of
Tithes into
Great and
Small Tithes.

Tithes, with regard to value, are divided into *great* and *small*.

Great tithes; as corn, hay and wood (*b*).

Small tithes; as the *prædial* tithes of other kinds, together with those which are called mixt, and personal (*c*).

(*t*) Prideaux on Tithes, 165.

(*u*) Ibid. 167.

(*x*) Ibid.

(*y*) Wats. c. 49.

(*z*) Ibid.

(*a*) Ibid.

(*b*) Degge, part 2, c. 1.

(*c*) Gibs. 663. [Sects. 17, 18, and 27 of 6 & 7 Will. 4, c. 71, referred to the commutation of great and small tithes.—Ed.]

But it is said, that this division may be altered, (1) By custom; which will make wood a small tithe, under the general words *minutiæ decimæ*, in the endowment of the vicar. (2) By quantity; which will turn a small tithe into great, if the parish is generally sown with it. (3) By change of place; which makes the same things, as hops in gardens small tithes, in fields great tithes. But this seems to be contradicted in the case of *Wharton v. Lisle*, E., 5 W., where the tithe of flax, though sown in great fields, was adjudged to the vicar as a small tithe, Holt, Chief Justice (who was of another opinion), being absent (*d*).

And Dr. Watson is of opinion, that the quantity of land within any parish sowed with any thing, cannot make the tithe of another nature; and that what is called small tithes seemeth to be in respect to the thing itself, and not from the small quantity of land sowed therewith, whereby the tithes thereof are but small, and of little value; for if that were to be the rule to determine what shall be said to be small tithes, then corn and hay in some places might be accounted small tithes (*e*).

And according to this latter opinion the law is now settled; namely, that the tithes are to be denominated great or small tithes, according to the nature and quality thereof, and not according to the quantity. As in the case of *Smith v. Wyatt*, July 21, 1742 (*f*). A bill was brought by the rector of a parish in Essex for the tithe of potatoes sown in great quantities in the common fields, and therefore claims it as a great tithe. The defendant, the vicar, insists, that notwithstanding it is sown in fields, it still continues a small tithe, and the quantity makes no difference. By the Lord Chancellor Hardwicke: The question is, whether potatoes planted in fields are great or small tithes. Potatoes in their nature are small tithes; then the question will be, whether they receive any alteration of their right, by cultivating in greater or smaller quantities. When the distinction of great and small tithes was at first settled, probably it was upon this foundation, that the former yielded tithes in greater quantities; and the species of tithes, which were called small, produced but in small quantities, though it might be arbitrary at first, yet it hath grown into a rule, and fixed so for the sake of certainty. If this sort of roots should be called small tithes when planted in gardens, and great when planted in fields, it would introduce the utmost confusion, and must vary in every year in every parish. If the quantity will turn small tithes into great, why will it not turn great tithes into small, when the quantity of great tithes is but small? Upon the whole, his lordship was of

(*d*) 4 Mod. 184; Gibs. 663.

(*f*) 2 Atk. 364.

(*e*) Wats. c. 39.

Tithes re-
strained to
the proper
Parish.

opinion, that the tithe of potatoes in whatever quantity, is a small tithe; and decreed accordingly.

It is said by Lord Coke and many others, that before the Council of Lateran in the year 1180, a man might have given his tithes to what church or monastery he pleased.

But this Dr. Prideaux doth utterly deny, for two reasons: 1. Because of the absurdity of the thing; for all the laws which had been made for tithes would have signified nothing, if no one had been certainly invested in a right to them; for in such case, no one could claim them, and in case of non-payment no one could make process in law for them; and consequently no one having a special right to demand them, it must have followed in practice, that what was thus paid to every spiritual person, would in fact and reality be paid to none at all. 2. Because before the said council there were in this land many appropriations, whereby the tithes of whole parishes were assigned to convents or other spiritual corporations; all which would have signified nothing, if the parishioners had been at liberty to pay their tithes to what spiritual person they should think fit (*g*).

But be that as it will, it is certain that now tithes of common right do belong to that church, within the precincts of whose parish they arise. This regulation, corresponding with the ancient law of the land, was enjoined by a decretal epistle of Innocent III. to the Archbishop of Canterbury in the year 1200 (*h*).

Portion of
Tithes with-
in another
Parish.

Yet notwithstanding, one person may prescribe to have tithes within the parish of another, and this is what is called a *portion of tithes* (*i*).

One reason of which might be, the lord of a manor's having his estate extending into what is now apportioned into distinct parishes; for there were tithes before the present distribution of parishes took place.

But whatever original these portions might have, they are in law so distinct from the rectory, that if one who hath them do purchase the rectory, the portion is not extinct, but remaineth grantable; but as to the cognizance thereof, the case being between parson and parson, and concerning a spiritual matter, that belongs, like the cognizance of other tithes, to the ecclesiastical court (*k*).

If a portion of tithes be possessed for 150 years, or for such a length of time as to make the right doubtful, a court of equity will not assist the plaintiff by directing an issue, but he must establish his right at law (*l*). Where a portion of tithes had been possessed for 250 years by the owners of the lands, the

(*g*) Prideaux on Tithes, 302.

(*i*) Gibbs. 663.

(*h*) See 2 Inst. 641; and 2 Bl. Com. 27.

(*k*) Ibid.

(*l*) *Scott v. Airey*, 1779, cited in 1 Anst. 311.

court presumed a grant of them before the 13 Eliz., though *tithes* were not specifically mentioned in the title deed, under which the lands were claimed (m).

Tithes extra-parochial (n), or within the compass of no certain parish, belong to the crown. By the canon law, they were to be disposed of at the discretion of the bishop; but, by the law of England, all extra-parochial tithes, as in several forests, do belong to the king, and may be granted to whom he will; and, accordingly, they have been actually adjudged to him, not only by several resolutions of law, but also in parliament, in the case of the prior and bishop of Carlisle, in the 18 Edw. 1, concerning tithes in Inglewood Forest, to wit, that the king in his forest aforesaid may build towns, assart lands (or make them fit for tillage), and confer those churches, with the tithes thereof, at his pleasure, upon whomsoever he pleaseth; because that the same forest is not within the limits of any parish (o).

Tithes in
Extra-Paro-
chial Places.

[But his right might be barred by the *Nullum Tempus* Act, 9 Geo. 3, c. 16; it is a personal privilege of the king to prescribe in *non decimando* (p).—ED.]

In the case of *Parry v. Gibbs* (q), it was held, that under a grant of tithes arising from lands *de novo assartatis et assartandis* within the extra-parochial parts of a forest, the grantee was not entitled to the tithes of those lands in the occupation of the keepers of the forest, nor of lands enclosed by a private person by incroachment upon the forest.

[By custom a parson or vicar might be entitled to the tithes of extra-parochial lands (r). By 2 & 3 Edw. 6, c. 13, every person having any cattle tithable depasturing on any waste or common ground whereof the parish is not certainly known, shall pay their tithes for the increase of such cattle to the parson, vicar, &c. of the parish where the owner of the cattle dwells (s). Tithes of agistment for cattle fed upon the common were not within this statute (t). By 17 Geo. 2, c. 37,

(m) *Oxenden, Bart. v. Skinner*, 4 Gwill. 1513; [see further on this subject, *Dean and Chapter of Bristol's case*, 1 E. & Y. 51; *Sir E. Coke's case*, 2 Roll. Rep. 161; 1 E. & Y. 314; *Futter v. Borome*, 1 E. & Y. 86; *Downes v. Moorman*, 1 E. & Y. 803; *Hungerford v. Howland*, 1 E. & Y. 103; *Wolley v. Platt*, M'Clel. 468; 3 E. & Y. 1167; *Boulton v. Richards*, 9 Price, 671; 3 E. & Y. 1068; *Pellatt v. Ferrars*, 2 Bos. & P. 542; 2 E. & Y. 494; *Bishop of Carlisle v. Blain*, 1 Y. & Jerv. 123; *Pritchett v. Honeybourne*, 1 Y. & Jerv. 135; *Wyld v. Ward*, 3 Y. & Jerv. 192; *Lewis v. Bridgman*, 2 Cl. &

Fin. 738; *Lewis v. Young*, 3 E. & Y. 1135.—ED.]

(n) [By common law even extra-parochial places were not exempt from tithes, *Page v. Wilson*, 2 J. & W. 328.—ED.]

(o) 1 Roll. Abr. 657; 2 Inst. 647.

(p) [*Comin's case*, Hill, 60; 1 E. & Y. 360; Com. Dig. Dismes (E.3.)]

(q) 4 Gwill. 1490.

(r) [Com. Dig. Dismes (C. 3); 1 E. & Y. 29.]

(s) [2 Inst. 651.]

(t) [*Ellis v. Saul*, 1 Anstr. 332; 2 E. & Y. 360; and generally, on the subject of extra-parochial places, see *Page v. Wilson*, 2 J. & W. 328;

when waste lands, formerly fens and marshes, are drained and improved, and the parish to which they belong cannot be ascertained, tithes arising therefrom are due to the tithe-owner of that parish which lies nearest to such lands.—ED.]

III. Of what things Tithes were paid, and of Exemptions before the Tithe Commutation Acts.

Things that
renew yearly.

Of common right, tithes are to be paid for such things only as do yield a yearly increase by the act of God (*u*).

Yet this rule admits of some exceptions: as, for instance, tithe is due of saffron, though gathered but once in three years; and concerning *sylva cædua*, there is an entry in the register, that consultations shall be granted thereof, notwithstanding that it is not renewed every year (*x*).

Once in the
Year.

Generally, of things increasing yearly, tithes shall be paid only once in the year (*y*).

But this rule also is not universally true: and it is evidently against the rule of the canon law, which requireth, that if seeds be sown upon the same ground, and renew oftener than once in the year, the tithes thereof shall be paid so often as they renew. And this seemeth still to be the law; as in the case of clover,

Att.-Gen. v. Lord Eardley, 3 E. & Y. 986; *Banister v. Wright*, Sty. 137, 1 E. & Y. 404; *Williams v. Pecke*, 1 E. & Y. 1237; *Att.-Gen. v. Oldys*, 1 E. & Y. 564; *Compost v. —*, 1 E. & Y. 437; *Morant v. Cumming*, Cro. Car. 94; 1 E. & Y. 359.—ED.]

(*u*) Wats. c. 46; 1 Rolle's Abr. 641. [The former editions of Burn contained the following catalogue of the several particulars tithable:—1, Corn and other grain, as beans, peas, tares, vetches; 2, Hay and other like herbs and seeds, as clover, rape, wood, broom, heath, furze; 3, Agistment or pasturage; 4, Wood; 5, Flax and hemp; 6, Madder; 7, Hops; 8, Roots and garden herbs and seeds, as turnips, parsley, cabbage, saffron, and such like; 9, Fruits of trees, as apples, pears, acorns; 10, Calves, colts, kids, pigs; 11, Wool and lamb; 12, Milk and cheese; 13, Deer and conies; 14, Fowl; 15, Bees; 16, Mills, fishings, and other personal tithes. It will be seen below that fishing and other personal tithes are not necessarily included under the operation of

the Tithe Commutation Acts, 6 & 7 Will. 4, c. 71, s. 90, and 2 & 3 Vict. c. 62, s. 9.—ED.]

(*x*) Gibs. 669.

(*y*) Gibs. 669. [The passage of the canon law quoted by Dr. Gibson for this opinion is a decree of Clement III. to be found in X. 3, 30, 21, "Ex parte canonicorum ecclesiæ tuæ nobis est querela proposita quod quidam agricultores, cum simul vel diversis temporibus anni, in eodem horto vel agro diversa semina sparserint, non nisi de unius illorum seminum fructibus decimas persolvunt. Mandamus quatenus si noveris rem taliter se habere, agricultores illos ut de omnibus prædiorum fructibus decimas absque diminutione persolvant, ecclesiastica censura compellas." But the complaint there made is for sowing different seeds in the same ground, and paying tithes of the produce of one only, and not for refusing to pay different tithes of the produce of the same seed; so that the authority does not support the position.—ED.]

for instance, which reneweth oftener than once in the year, tithes thereof shall be paid as often as it doth renew.

Of common right, no tithes are to be made of quarries of stone or slate, for that they are parcel of the freehold, and the parson hath tithe of the grass or corn which grow upon the surface of the land in which the quarry is; so also, not for coal, turf, flags, tin, lead, brick, tile, earthen pots, lime, marle, chalk, and such like, because they are not the increase, but of the substance of the earth. And the like hath been resolved of houses, (considered separately from the soil), as having no annual increase. But, by particular custom, tithes of any of these may be payable (z).

Things of the substance of the Earth.

By the common law of England, there is no tithe due for things that are *feræ naturæ*, and therefore it hath been resolved, that no tithe shall be paid for fish taken out of the sea, or out of a river, unless by custom, as in Wales, Ireland, Yarmouth, and other places: neither, for the same reason, is any tithe due of deer, conies, or the like. But if the tithe thereof be due by custom, it must be paid (a).

Things *feræ naturæ*.

[No tithe is due for fowls or eggs of fowls in a decoy (b), or for hounds, or for animals kept for pleasure or curiosity. —ED.]

Things tame.

By the statute of 2 & 3 Edw. 6, c. 13, s. 5, "All such barren heath or waste ground, other than such as be discharged from the payment of tithes by act of parliament, which before this time have lain barren, and paid no tithes by reason of the same barrenness, and now be or hereafter shall be improved and converted into arable ground or meadow, shall, after the end and term of seven years next after such improvement fully ended and determined, pay tithe for the corn and hay growing upon the same."

Barren Land.

Sect. 6. "Provided, that if any such barren, waste or heath ground hath before this time been charged with the payment of any tithes, and the same be hereafter improved or converted into arable ground or meadow, the owner thereof shall, during the seven years next after the said improvement, pay such kind of tithe as was paid for the same before the said improvement."

Barren.]—Although it doth yield some fruit, and do pay tithes for wool, and lamb, or the like; yet if it be barren land as to agriculture or tillage, which this clause meant to advance, it is within this act (c).

But yet if the ground be not apt for tillage, yet if it be not of its own nature barren, it is not within this act. As if a wood be stubbed and grubbed, and made fit for the plough,

(z) 2 Inst. 651.

(b) [*Camell v. Ward*, 1 E. & Y.

(a) Deg. p. 2, c. 8; 1 Inst. 651, 530; 1 Eag. on Tithes, 427.]

(c) 2 Inst. 655.

664.

and employed thereunto, yet it shall pay tithes presently, for wood ground is fertile, and not barren (*d*).

In the case of *Stockwell v. Terry*, July 14, 1748 (*e*), it was held by Lord Hardwicke, that such land only is within this clause, as, above the necessary expense of enclosing and clearing, requires also expense in manuring, before it can be made proper for agriculture; and he decreed tithe to be paid, on its being proved that the land bore better corn than the arable land in the parish, without any extraordinary expense of manure.

In a prohibition between *Sharington* and *Fleetwood*, H., 38 Eliz. (*f*), for tithes in Orwell, in the county of Lancaster, it was resolved, that if marsh meadow, or other land, for not cleansing of the trenches or sewers, or by sudden accident, or inundation of waters, be surrounded; or by ill husbandry or unprofitable negligence, any land become overrun with bushes, furze, whins, and briars; yet are not they or any of them said to be barren land within this statute, because, of their own nature, they are fruitful; and the parson shall not by this act be barred of his tithes, by the ill husbandry or negligence of the owner or possessor.

Shall, after the end and term of seven years next after such Improvement, fully ended and determined, pay Tithe.—Note, hear are no express words of discharge of the tithes during the seven years, but by reasonable construction it doth impliedly amount to a discharge during the seven years: and the seven years are to be accounted next after the improvement (*g*).

The trial whether the lands are barren or not within the statute, must be in the temporal, and not in the spiritual court. And therefore, in a suit for tithes in the spiritual court, if the defendant plead that it is barren land, and that plea be refused, or issue taken upon it, there a prohibition shall be granted. But a prohibition shall not be granted upon a suggestion only that it is barren land, before it be pleaded in the spiritual court (*h*).

Forest Land.

As lands which are in no parish pay tithes to the king, so lands lying within the precincts of a forest, (though also in a parish,) if they be in the hands of the king, do pay no tithes. And this privilege extends to the king's lessee, but not to his feoffee. But if the forest be disafforested, and be within any parish, then they ought to pay tithes in the hands of the king's lessee (*i*).

(*d*) 2 Inst. 656; Bunb. 159.

(*e*) 1 Ves. 115.

(*f*) 2 Inst. 656.

(*g*) Ibid.

(*h*) Deg. p. 2, c. 12; 1 Keb. 253;

1 Ves. 117. [See *post*, 6 & 7 Will. 4, c. 71, s. 67. Sect. 43 of that act related to the mode of effecting the rent-charge on them.—ED.]

(*i*) Boh. 163, 177; Gibs. 680.

It hath been questioned, where a park hath paid a modus, and is disparked, whether the modus shall continue or be discharged, and tithes paid in kind; and all the books are clear, that if the modus was a certain consideration in money for all the tithes of such a park, such modus shall hold, notwithstanding it be disparked; but if the modus was for the deer and herbage of such a park, the modus is gone upon disparking (*k*).

In like manner, if the modus hath been to pay a buck and a doe for all the tithes of such a park, and the park is disparked, the modus shall continue, and the owner may give a buck and a doe out of another park; but if it was to pay the shoulder of every deer, or expressly a buck and a doe out of the same park, the modus is gone (*l*).

But where the modus was part in money and part in venison out of the park, (namely, two shillings and the shoulder of every deer,) the court was divided; two being of opinion that the two shillings continued, and that the spiritual court should assign an equitable recompence for the shoulders, according to the number that had been usually paid; and the other two, that the money and venison making one entire modus, the one being gone, the whole was dissolved (*m*).

Glebe lands in the hands of the parson shall not pay tithe to the vicar, though endowed generally of the tithes of all lands within the parish; not being in the hands of the vicar, shall they pay tithe to the parson; and this is according to the known maxim of the canon law, that the church shall not pay tithes to the church (*n*). *Non enim Levitæ a Levitis decimas accepisse leguntur* (*o*). But this exemption does not extend to the lessee or feoffee of the vicar (*p*). But if the vicar be specially endowed of the small tithes of the glebe lands of the parsonage, then he shall have them, though they are in the hands of the appropriator (*q*). Glebe Land.

If a parson lease his glebe lands, and do not also grant the tithes thereof, the tenant shall pay the tithes thereof to the parson (*r*).

And if a parson lets his rectory, reserving the glebe lands, he shall pay the tithes thereof to his lessee (*s*).

If a parson sow his glebe, and dieth before severance, and afterwards his successor is inducted, and his executor or vendee severeth the corn, the successor shall have the tithe thereof; for although the executor represent the person of the testator,

(*k*) Gibs. 684; Wats. c. 47; Moore, 909; 1 Roll. 176.

(*l*) Gibs. 684; Wats. c. 47.

(*m*) Gibs. 684; Wats. c. 47; *Cowper v. Andrews*, Hob. 39; Moore, 863; 1 Roll. Rep. 120.

(*n*) Moore, 457, 479, 910; 1 Brownl. 69; Sav. 3; Cro. Eliz. 479, 578.

(*o*) X. 30, 2.

(*p*) Brownl. 69; 17 Viner's Ab. 297.

(*q*) Gibs. 661; Deg. p. 2, c. 2.

(*r*) Deg. p. 2, c. 2; 1 Roll. Abr. 655.

(*s*) Gibs. 661.

yet he cannot represent him as parson, inasmuch as another is inducted (*t*).

Otherwise, if the parson dieth after severance from the ground, and before the corn is carried off; in this case the successor shall have no tithe; because, though it was not set out, yet a right to it was vested in the deceased parson by the severance from the ground. The same is true in case of deprivation, or resignation, after glebe sown: the successor shall have the tithe, if the corn was not severed at the time of his coming in; otherwise if severed (*u*). [See title *Vacation*.]

[Sect. 43 of 6 & 7 Will. 4, c. 71, provided the mode of fixing a *contingent* rent-charge on glebe not in the hands of the owner. Sect. 6 of 2 & 3 Vict. c. 62, provided for the merger of such *contingent* rent-charge in land.—ED.]

Abbey Land.

All abbots and priors and other chief monks originally paid tithes as well as other men, until Pope Paschal II. exempted generally all the religious from paying tithes of lands in their own hands. And this continued as a general discharge till the time of King Henry II., when Pope Hadrian IV. restrained this exemption to the three religious orders only of Cistercians, Templars, and Hospitalers; unto which Pope Innocent III. added a fourth, to wit, the Præmonstratenses. And this made up the four orders, which are commonly called the privileged orders; for that they claimed a privilege to be discharged of tithes by the pope's establishment.

Then came the general Council of Lateran in the year 1215, and further restrained the said exemption from tithes of lands in their own occupation to those lands which they were in possession of before that council.

But the Cistercians, as it appeareth, in process of time did procure bulls to exempt also their lands which were let to farm; for the restraining of which practice the statute of 2 Hen. 4, c. 4, was made; by which it was enacted, that as well they of the said order as all other religious and seculars which should put the said bulls in execution, or from thenceforth should purchase other such bulls, or by colour thereof should take advantage in any manner, should incur a *præmunire*.

So that this statute restrained them from purchasing any such exemptions for the future; and as to the rest, left their privileges as they were before the said statute; that is to say, under a limitation to such lands only as they had before the Lateran Council aforesaid; and it is certain they obtained many lands after that council, which therefore were in no wise exempted. And also the said statute left them as it found

(*t*) 1 Roll. Abr. 655.

(*u*) Gibs. 662; *Moyle v. Ewer*, 2 Bulst. 183; 1 Roll. Abr. 655.

them, subject to the payment of divers compositions for tithes of their demesne lands made with particular rectors, who, contesting their privileges even under that head, brought them to compound. Which two restraints were also followed by a third at the time of the dissolution; when as many of them as did not fall under the statute of the 31 Hen. 8, c. 13, lost their exemptions, there being no saving clause in the acts of their dissolution or surrender to preserve or to revive them.

But as to those which were dissolved by the 31 Hen. 8, c. 13, s. 21, it is enacted as followeth; viz. "Where divers abbots, priors, and other ecclesiastical governors of the monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friars, and other religious and ecclesiastical houses and places dissolved by this act, have had divers parsonages appropriated, tithes, pensions, and portions, and also were acquitted and discharged of the payment of tithes for their monasteries or other religious and ecclesiastical houses and places as aforesaid, manors, messuages, lands, tenements, and hereditaments; it is enacted, that as well the king our sovereign lord, his heirs and successors, as all other persons, their heirs and assigns, who shall have any of the said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friars, or other ecclesiastical houses or places, sites, circuits, precincts, of the same or any of them, or any manors, messuages, parsonages appropriate, tithes, pensions, portions, or other hereditaments, which belonged to any such religious house, shall hold and enjoy as well the said parsonages appropriate, tithes, pensions, and portions of the said monasteries, abbathies, priories, nunneries, colleges, hospital, houses of friars, and other religious and ecclesiastical houses and places, sites, circuits, precincts, manors, meases, lands, tenements, and other hereditaments, according to their estates and titles, discharged and acquitted of payment of tithes, as freely and in as large and ample manner as the said late abbots, priors, and other ecclesiastical governors, held and enjoyed the same."

By reason of which discharge from tithes of lands which were given to the king by this act, and which were discharged in the hands of the religious, it hath been more strictly inquired what were the houses dissolved by this act, than by any other of the acts of dissolution; which will best appear by the following catalogue.

[The possession of alien priories was given to the crown by 4 Hen. 5, in which there were no words to restrain their privileges (x).—ED.]

(x) [*Penfold v. Groome*, 2 Jac. & W. 534; 2 E. & Y. 536; *Page v. Wilson*, 2 Jac. & W. 513. The number of alien priories is said to have been 146. See *Account of Alien Priories*, by J. Nicholls: London, 1797.—ED.]

Tithes—[*Monasteries dissolved by 31 Hen. 8.*]

Catalogue of Monasteries of the yearly value of 200l. or upwards, dissolved by the statute of the 31 Hen. 8, and by that means capable of being discharged of tithes; in which are the following abbreviations:—

Ab. Abbey; Pr. Priory; C. Aust. Canons of St. Austin; Bl. M. Black Monks; Wh. C. White Canons; Ben. Benedictines; Gilb. Gilbertines; Præm. Præmonstratenses; Carth. Carthusians; Mon. Monks; Clun. Cluniacs; Cist. Cisterians; T. in the time of; Ab. about the year.

Monasteries.	Order.	Founded.	Value.		
			£	s.	d.
<i>Berkshire.</i>					
Reading.....	Ben.	T. Hen. 1.	1938	14	3
Busleham Ab.....	C. Aust....	13 Ed. 3.....	285	0	0
Abington Ab.	Ben.	720	1876	10	9
<i>Bedfordshire.</i>					
Newnham Pr.	C. Aust....	T. Hen. 1.	293	15	11
Elmeston Ab.	Ben.	T. W. Conq. ..	284	12	11
Wardon Ab.....	Cist.	1139	389	16	6
Chicksand Pr.....	{ Wh. C } { Gilb. . }	T. W. Rufus	212	3	5
Dunstable Ab.....	C. Aust....	T. Hen. 1.	344	13	3
Wooburn Ab.....	Cist.	T. John	391	18	2
<i>Buckinghamshire.</i>					
Ashrug Coll.....	C. Aust....	T. Ed. 1.	416	16	4
Notley Ab.	C. Aust....	1112	437	6	8
Missenden Ab.	Ben.	1293	261	14	6
<i>Cambridgeshire.</i>					
Thorney Ab.	Ben.	972	411	12	11
Barnewell Pr.....	C. Aust....	1092	256	11	10
<i>Cheshire.</i>					
St. Werburge Ab.	Ben.	1095	1003	5	11
Combermeer Ab.	Cist.	1134	225	9	7
<i>Cornwall.</i>					
Bodmin Pr.	C. Aust....	936	270	0	11
Launceston Ab.	C. Aust....	T. W. Conq. ..	354	0	11
St. Germans Ab.	C. Aust....	T. Ethelston ..	243	8	0
<i>Cumberland.</i>					
Carlisle Pr.	C. Aust....	T. W. Rufus ..	418	3	4
Holme Coltrom Ab..	Cist.	1135	427	19	3
<i>Derbyshire.</i>					
Darley Ab.....	C. Aust....	T. Hen. 2	238	14	5
<i>Devonshire.</i>					
Ford Ab.....	Cist.	1133	374	10	6
Newnham Ab.....	Cist.	Ab. 1246.....	227	7	8
Dinkeswel Ab.	Cist.	1201	294	18	6
Hertland Ab.	C. Aust....	T. Hen. 2	306	3	2
Torre Ab.	Præm. ...	T. Ric. 1.....	396	0	11
Buckfast Ab. .	Cist.	T. Hen. 2	460	11	2

Monasteries.	Order.	Founded.	Value.		
			£	s.	d.
Plimpton Ab.	Cist.	T. Edw. I.	241	17	9
Tavestock Ab.	Ben.	961	902	5	7
Exon Pr.	Clun.	T. Hen. 1	502	12	9

Dorsetshire.

Abbotsbury	Ben.	Ab. 1016	390	19	2
Middleton Ab.	Ben.	T. Ethelstan ..	538	13	11
Tarrent Ab.	Cist.	By Hen. 3	214	7	9
Shafton Ab.	Ben.	941	1166	8	9
Cerne Ab.	Ben.	T. Edgar.	515	17	10
Sherburn Ab.	Ben.	Ab. 370	682	14	7

Durham.

St. Cuthbert Ab.	Ben.	Ab. 842	1366	10	9
Tinmouth Pr.	Ben.	— — — — —	397	11	5

Essex.

Berking Ab.	Ben.	680	862	12	5
Stratford Langthorne Ab.	Cist.	1135	511	16	3
Waltham Ab.	C. Aust.	Ab. 1060.	900	4	3
Walden Ab.	Ben.	1136 ..	372	18	1
St. Oswith Ab.	C. Aust.	1120	677	1	2
Colchester Ab.	C. Aust.	T. Hen. 1	523	17	0

Gloucestershire.

Bristol Ab.	C. Aust.	T. Hen. 1	670	13	11
Hayles Ab.	Cist.	1246	357	7	8
Winchcomb Ab.	Ben.	787	759	11	9
Tewkesbury Ab.	Ben.	715	1598	1	5
Cirencester Ab.	C. Aust.	T. Hen. 1	1051	7	1
Kingswood Ab.	Cist.	1139	244	11	2
Gloucester Ab.	Ben.	680	1946	5	9
Lanthony Pr.	C. Aust.	1136	641	19	11

Hampshire.

St. Swithin's Winton Ab.	Ben.	634	1507	17	2
Hyde Ab.	Ben.	By Alfred	865	18	0
Wherwell Ab.	Ben.	By Edgar	339	8	7
Romsey Mon.	Ben.	907	393	10	10
Twinham Pr.	C. Aust.	Before 1042 ..	312	7	0
Bello loco Ab.	Cist.	1024	326	13	2
Southwick Pr.	C. Aust.	T. Hen. 1,	257	4	4
Tichfield Ab.	Præm.	T. Hen. 3	249	16	1

Hertfordshire.

St. Alban's Ab.	Ben.	755	2102	7	1
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Huntingdonshire.

St. Neot's Ab.	Ben.	Ab. t. Hen. 1 ..	241	11	4
Ramsey Ab.	Ben.	969	1716	12	4

Kent.

St. Austin's, Cant	Ben.	605	1413	4	11
Ledis Pr.	C. Aust.	1119	362	7	7
Feversham Ab.	Clun.	1147	286	12	6
Boxley Ab.	Cist.	1144	204	4	11

Tithes—[*Monasteries dissolved by 31 Hen. 8.*]

Monasteries.	Order.	Founded.	Value.		
			£	s.	d.
Roffen Ab.	Ben.	600	486	11	5
Malling Ab.	Ben.	By Edmund ..	218	4	2
Dertford Ab.	C. Aust.	1372	380	0	0
<i>Lancashire.</i>					
Whalley Ab.	Cist.	1172 ..	321	9	1
<i>Leicestershire.</i>					
Leicester Ab.	C. Aust.	1143	951	14	5
Croxden Ab.	Præm. ... Ab. R. 1		385	0	10
Launday Ab.	C. Aust.	T. W. Rufus ..	399	3	3
<i>Lincolnshire.</i>					
Lincoln St. Cath. Pr.	Gilb. ..	T. Hen. 2	202	5	0
Kirkstead Ab.	Cist.	1129	286	2	7
Revesley Ab.	Cist.	1142	217	2	4
Thornton Ab.	C. Aust.	1139	594	17	10
Barney Ab.	Ben.	712	366	6	1
Croyland Ab.	Ben.	716	1803	15	10
Spalding Ab.	Ben.	1052	761	8	11
Sempringham Ab.	Gilb. ..	1148	317	4	1
Epworth Mon.	Carth. ..	1386	237	15	2
<i>London and Middlesex.</i>					
St. John Jerusalem Pr.		1100	2385	12	8
St. Barth. Smithfield	C. Aust.	1102	653	15	0
St. Mary Bishopsgate Pr.		1187	478	6	6
Clerkenwell Pr.	Ben.	T. Stephen	262	19	0
London Minors	Ben.	T. Edw. 1	318	8	5
Westminster Ab.	Ben.	T. Edgar	3471	0	2
Sion Ab.	C. Aust.	By Hen. 5	1731	8	4
London, a house of.	Carth. ..	T. Edw. 3	642	0	4
St. Clare witht. Aldg. Mon.		1292	418	8	5
St. Mary charter house	Carth. ..	1379	736	2	7
St. John Holiwell	Bl. M.	1318	347	1	3
St. Mary East Smithf. Ab.	Cist.	1360	602	11	10
<i>Norfolk.</i>					
Thetford Ab.	Clun. ..	1103	312	14	4
Wymundham Ab.	Ben.	1139	211	16	6
Hulmo Ab.	Ben.	By Canute	583	17	0
Westerham Ab.	Præm. ...	T. Hen. 2	228	0	0
Walsingham Ab.	C. Aust.	Ab. t. Stephen ..	391	11	6
Castle-acre Ab.	Clun. ..	1090	306	11	4
West-acre Ab.	Clun. ..	T. W. Rufus ..	260	13	7
<i>Northamptonshire.</i>					
Burg. St. Peter Ab.	Ben. ...	{ By Rosere, kg. of Mercia }	1721	14	0
Pipewell Ab.	Cist.	1143	286	11	8
St. Andrews Pr.	Clun. ..	1067	263	7	1
Sulby Ab.	Præm. ...	T. Stephen	258	8	5
<i>Nottinghamshire.</i>					
Lenton Pr.	Clun. ..	T. Hen. 1	329	5	10

Monasteries.	Order.	Founded.	Value.		
			£	s.	d.
Thurgarton Pr.	C. Aust.	T. Hen. 1	259	9	4
Welbeck Ab.	C. Aust.	T. Stephen	249	6	3
Warsop Pr.	C. Aust.	.....	239	10	5
Bella Valla Pr.	Carth. ...	Ab. 16 Edw. 3	227	8	0
Newstead Pr.	C. Aust.	T. Edw. 3.	219	18	8

The two last are under value in Dugdale, but thus by Speed.

Northumberland.

Tinmouth, a cell to St. Alban's, a nunnery	511	4	1
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Oxfordshire.

Godstow Ab.	Ben.	T. Stephen	274	5	10
Eynesham Ab.	Ben.	By Ethelred ..	441	12	2
Osney Ab.	C. Aust.	T. Hen. 1	654	10	2
Thame Ab.	Cist.	T. Hen. 1	256	13	11
Oxford Pr. ....	.....	Bef. Conq.	224	4	8
Dorchester Ab.	C. Aust.	635	219	12	0

Shropshire.

Haghmond Ab.	C. Aust.	1100	259	13	7
Lilleshull Ab.	C. Aust.	{ By Elfreda, kg. of Mercia }	229	3	1
Wigmore Ab.	C. Aust.	1172	207	2	10
Wenlock Pr.	Clun. ..	1181, or before	401	0	7
Salop Ab.	C. Aust.	1081	615	4	3
Hales Owen Ab.	Præm. ...	T. John	337	15	6

Somersetshire.

Glassenbury Ab.	Ben.	About 300	3311	7	4
Brewton Ab.	C. Aust.	Ab. t. Conq. ..	439	6	8
Henton Pr.	Carth. ..	T. Hen. 3	248	19	2
Witham Pr.	Carth. ..	By Hen. 2	205	15	0
Taunton Pr.	C. Aust.	T. Hen. 1	286	8	10
Bath Ab.	Ben.	T. Hen. 3	617	2	3
Keynsham Ab.	C. Aust.	T. Hen. 1	419	14	3
Michelney Ab.	Ben.	740.	447	4	11
Buckland Pr.	Cist.	T. Ed. 1	223	7	4

Staffordshire.

Dela Cres Ab.	Cist.	1153	227	5	0
Burton-upon-Trent	Ben.	T. Eadred	267	14	3
Croxden Ab.	Cist.	—	—	—	—

Suffolk.

St. Edmundsbury Ab.	Ben.	1020	1659	13	11
Butley Ab.	C. Aust.	1171	318	17	2
Sibeton Ab.	Cist.	1150	250	15	7
Ixworth Pr.	C. Aust.	T. W. Conq. ..	280	9	5

Surrey.

Merton Pr.	C. Aust.	1414	957	19	5
Shene Pr.	Carth. ..	1414	777	12	0
Chertsey Ab.	Ben.	666	659	15	8
Newark Pr.	—	—	258	11	11

Tithes—[Monasteries dissolved by 31 Hen. 8.]

Monasteries.	Order.	Founded.	Value.		
			£	s.	d.
St. Mary Overs Ab.	C. Aust.	1106.	625	6	6
Bermundsey Ab.	C. Aust.	1106.	474	14	4
<i>Sussex.</i>					
Lewes Ab.	Clun.	T. W. Ruf.	920	4	6
Robert's Bridge Ab.	Cist.	T. Hen. 2.	248	10	6
Battaile Ab.	Bl. M.	1066.	987	0	11
<i>Warwickshire.</i>					
Combe Ab.	Cist.	T. Steph.	311	15	1
Kenelworth Ab.	C. Aust.	T. Hen. 1.	538	19	0
Meryval Ab.	Cist.	1148.	254	1	8
Nuneaton Mon.	Ben.	T. Hen. 2.	253	14	5
<i>Wiltshire.</i>					
Malmsbury Ab.	Ben.	Ab. 670.	803	17	7
Bradenstock Pr.	C. Aust.	T. W. Conq. ..	212	19	3
Edington Pr.	C. Aust.	1352.	442	19	7
Ambresbury Ab.	Ben.	1177.	494	15	2
Wilton Ab.	Ben.	T. Ethelwolf. ..	601	1	1
Fairley, a cell to Lewes	Clun.	1125.	217	0	4
Laycock Ab.	C. Aust.	1232.	203	12	3
<i>Worcestershire.</i>					
Malverne Ab.	Ben.	1083.	308	1	3
Evesham Ab.	Ben.	T. Offa.	1783	12	9
Pershire Ab.	Cist.	—	643	4	5
Hales Owen Ab.	Præm.	T. John.	282	13	4
Bordesly Ab.	Cist.	1138.	388	1	1
<i>Yorkshire.</i>					
St. Mary's York Ab.	Ben.	1088.	1550	7	0
Selby Ab.	Ben.	T. W. Conq. ..	720	12	10
Kirkstal Ab.	Cist.	1147.	329	2	11
De Rupe Ab.	Cist.	1147.	224	2	5
Monks Burton Ab.	Clun.	Ab. 1186.	239	3	6
Nostel Ab.	C. Aust.	T. Hen. 1.	492	18	2
Pomfrait Ab.	Clun.	T. W. Conq. ..	237	14	8
Gisbourn Ab.	C. Aust.	T. Steph.	628	3	4
Whitby Ab.	Ben.	T. W. Conq. ..	437	2	9
Montegratiæ Ab.	Carth.	Ab. 1396.	323	2	10
Newburge Pr.	C. Aust.	1145.	367	8	3
Belland Ab.	Cist.	1134.	238	9	4
Kirkham Ab.	C. Aust.	T. Hen. 1.	269	5	9
Melsa Ab.	Cist.	1136.	299	6	4
Brilington	C. Aust.	T. Hen. 1.	547	6	11
Walton Ab.	Gilb.	T. Steph.	360	16	10
Bolton in Craven Pr.	C. Aust.	T. Hen. 1.	212	3	4
Raval Ab.	Cist.	1132.	278	10	2
Jerval Ab.	Cist.	T. Steph.	234	18	5
Furnes Ab.	Cist.	1127.	805	16	5
De Fontibus.	Cist.	1132.	998	6	8
Warter Pr.	C. Aust.	T. Hen. 1.	221	3	10
Richal.	—	—	351	14	6

Monasteries.	Order.	Founded.	Value.		
			£	s.	d.
Old Maulton Ab.....	—	T. Steph.....	257	7	0
St. Michael near Hull.....	Carth. ..	1377.	231	17	3

In Wales.

Valle de Sancta Cruce in } Denbeighshire.....	Cist.....	T. Edw. 1.	214	3	5
Strata Florida in Cardigan- } shire.....	Cist. or } Clun. }	T. W. Conq. ..	1226	6	0

At the time of the dissolution, the religious were discharged from payment of tithes three several ways; either by the pope's bulls, or by their order as aforesaid, or by composition: which discharges would have vanished and expired with the spiritual bodies whereunto they were annexed, if they had not been continued by the special clause abovementioned (as it happened to those which were dissolved by the other statutes of dissolution, for want of such clause). And by the said clause also is created a new discharge, which was not before at the common law, that is, *unity of the possession* of the parsonage and land tithable in the same hand: for if the monastery at the time of the dissolution was seised of the lands and rectory, and had paid no tithes within the memory of man for the lands, those lands shall now be exempted from payment of tithe, by a supposed perpetual unity of possession; because the same persons that had the lands, having also the parsonage, they could not pay tithes to themselves (*y*).

How the Religions were discharged from payment of Tithes.

But though by such union the persons so possessed were discharged from the payment of tithes, yet the lands were not absolutely discharged of the tithes: for upon any disunion that might happen, the payment of tithes again revived: so that the union only suspended the payment, but was no absolute discharge of the tithes themselves. And therefore such union is not to be pleaded as a discharge from tithes, but only as a discharge from the payment of tithes (*z*).

And such union must appear to have had these four qualities: First, it must have been *just*; that is, claimed by right, and good and lawful title; and not by disseisin or other tortious, unjust, or unlawful act: for such an union would not have been a good discharge within the statute. Secondly, it must have been *equal*; that is, there must have been a fee-simple both in the lands and in the tithes; as well of the lands upon which the tithes are, as of the parsonage or rectory: for if those religious persons had held but by lease, that had not been such a unity as the statute intended. Thirdly, it must have been *free*; that is, free from the payment of any tithes in any manner: for if the abbots, or their farmers, or their tenants at will or for years, had paid any manner of tithes

(*y*) God. 383; Bob. 241, 248.

(*z*) Bob. 248.

before the dissolution, it may be alleged as a sufficient bar to avoid the unity pleaded in discharge of tithes. Fourthly, it must have been *perpetual*, time out of mind, that such religious houses were endowed, and such religious persons must have had in their hands both the rectory and lands united, perpetually, and without interruption, before the memory of man, or (as it seems according to the rule of the common law) before the first year of King Richard I., discharged of tithes: for if by any records or ancient deeds, or other legal evidence, it can be made to appear, that either the lands or the rectory came to the abbey since the said first year of King Richard I., such union cannot be said to be perpetual (a).

And, moreover, the lands of such houses dissolved as aforesaid, shall be free from the payment of tithes only so far as they were free in the hands of the churchmen, namely, whilst they are in the hands and manurance of the owners thereof; and therefore it is necessary for the party who would have the advantage of this privilege, expressly to show and aver, that the lands are in his hands and manurance: for to say that he is seised of the lands is not sufficient; for he may be seised thereof and yet another manure them (b).

It hath been held also, that a tenant in tail, who hath an estate of inheritance, shall be discharged in virtue of the clause aforesaid, so long as he occupies the same himself; but that unity of possession doth not discharge a copyholder (though a prior in that case was seised in fee of the manor of which it was parcel, and was also impropriator); much less a tenant for life or years (c). For in such case, the possession is in the copyholder or other tenant, and not in the landlord or lessor; and consequently it is not a unity of possession (d). But in the case of *Hett v. Meeds* (e), it was held that the lands of a tenant for life under a settlement were exempt from tithes.

But it is otherwise with regard to the king; whose farmers shall be discharged of such tithes, as the spiritual persons were, because the king cannot cultivate the lands himself. And so long as the king hath the freehold, his farmers shall have such privilege: but if after having leased them, he shall sell the same, or shall grant over the reversion, then the farmers shall pay tithes. And it hath been said, that this privilege extends no further than to the king's tenants at will; not to tenants for life or years (f).

Upon the whole, not all lands that belonged to the religious houses in general are discharged from tithes; but only such lands are capable of discharge, as belonged to the houses

(a) Bob. 250.

(b) Comyns, 498; *Fox v. Bardwell*, E., 8 Geo. 2; Wood, b. 2, c. 2.

(c) Gibs. 673.

(d) Hardres, 174; Moore, 219, 534.

(e) 4 Gwill. 1515.

(f) Gibs. 673; Bob. 282. 283; Moore, 915; Hardres, 315.

which were dissolved by the statute of the 31 Hen. 8. And not all those lands, which belonged to the religious houses dissolved by that statute, are discharged from tithes; but only such of them as were discharged at the time of their dissolution. But what shall be sufficient evidence of such discharge, and of the manner of such discharge, that is, whether by order, bull, composition, or unity of possession, at this distance of time, seemeth difficult to determine with precision; as strictness of proof may be more or less requisite, according to the particular circumstances of the case.

IV. *Account of the Tithe Commutation Acts.*

[Dr. Paley (*g*) concludes his chapter on “Population, Provision, Agriculture and Commerce,” with the following remarks:

[“ But, secondly, agriculture is discouraged by every constitution of landed property which lets in those, who have no concern in the improvement, to a participation of the profit. This objection is applicable to all such customs of manors as subject the proprietor, upon the death of the lord or tenant, or the alienation of the estate, to a fine apportioned to the improved value of the land. But of all institutions which are in this way adverse to cultivation and improvement, none is so noxious as that of *tithes*. A claimant here enters into the produce, who contributed no assistance whatever to the production. When years, perhaps, of care and toil have matured an improvement; when the husbandman sees new crops ripening to his skill and industry; the moment he is ready to put his sickle to the grain, he finds himself compelled to divide his harvest with a stranger. Tithes are a tax not only upon industry, but upon that industry which feeds mankind; upon that species of exertion which it is the aim of all wise laws to cherish and promote; and to uphold and excite which, composes, as we have seen, the main benefit that the community receives from the whole system of trade, and the success of commerce. And, together with the more general inconveniency that attends the exaction of tithes, there is this additional evil, in the mode at least according to which they are collected at present, that they operate as a bounty upon pasturage. The burthen of the tax falls with its chief, if not with its whole weight, upon tillage; that is to say, upon that precise mode of cultivation which, as hath been shown above, it is the business of the state to relieve and remunerate, in preference to every other. No measure of such extensive concern appears to me so practicable, nor any single alteration

Remarks of
Dr. Paley on
Tithes.

(*g*) [Paley's Moral and Political Philosophy, vol. ii. p. 407, octavo edition.]

so beneficial, as the conversion of tithes into corn-rents. This commutation, I am convinced, might be so adjusted, as to secure to the tithe-holder a complete and perpetual equivalent for his interest, and to leave to industry its full operation, and entire reward."

Tithe Commu-
tation Acts ;

Principle of.

[It should seem that the recent Tithe Commutation Acts have been framed for the purpose of carrying into execution the scheme recommended in this passage. They are confined in their operation to England and Wales, and are four in number. 1. The 6 & 7 Will. 4, c. 71, intituled "An Act for the Commutation of Tithes in England and Wales," passed 13th of August, 1836. 2. The 7 Will. 4 & 1 Vict. c. 69, intituled "An Act to amend the foregoing Act passed 15th of July, 1837. 3. The 1 & 2 Vict. c. 64, intituled "An Act to facilitate the Merger of Tithes in Land," passed on the 4th of August, 1838. 4. The 2 & 3 Vict. c. 32, intituled "An Act to explain and amend the Acts for the Commutation of Tithes in England and Wales," passed on the 17th of August, 1839. These statutes must be considered as constituting one enactment (*h*), their principle being to substitute a *corn-rent, payable in money and permanent in quantity, though fluctuating in value, for all tithes*, whether payable under a *modus*, or composition or not, which may have heretofore belonged either to ecclesiastical or lay persons. Such rent-charge is to be paid by two half-yearly payments, namely, on the 1st of July and the 1st of January in every year. Certain commissioners and assistant commissioners were appointed to execute the provisions of this act. Two modes were allowed of ascertaining the gross amount of the rent-charge, payable in respect of the tithes (*i*) of the whole parish. 1, a voluntary agreement, or after a specified period had elapsed without any such arrangement being adopted : 2, a compulsory award (*k*). These

(*h*) [By sect. 37 of 2 & 3 Vict. c. 62, it is enacted, "that this act shall be taken to be a part of the first recited act for the commutation of tithes in England and Wales, and of the secondly recited act for amending the same, and of the said thirdly recited act to facilitate the merger of tithes; and that in the construction of this act, unless there be something in the subject or context repugnant to such construction, the several words used in this act shall have and bear the same interpretation as is given to such words respectively in the said recited acts or either of them; and whenever a word importing the singular number or masculine gender only is used, the same shall be understood to include and shall be applied

to several persons or parties as well as one person or party, and females as well as males, and several matters or things as one matter or thing respectively, and the converse.—Ed.]

(*i*) [Certain exceptions are mentioned below.—Ed.]

(*k*) [It is most probable that by one of these two methods a permanent commutation will have been effected, and consequently the old law on tithes have become a matter of historical curiosity some time before the publication of this edition of Dr. Burn's work. The Editor has therefore given in this chapter such clauses only of the Tithe Commutation Acts as constitute the future law on this subject. Ed.]

acts are not to affect tithes due *before* the commutation (*l*), and make provision for payments due for the period intervening between the end of former compositions and the commutation (*m*). False evidence given before the commissioners under this act was to be esteemed as perjury, and withholding evidence a misdemeanour (*n*).

[It may be well in this place to observe some of the principal features which discriminate the new from the old law on tithes.

Peculiarities
of the new
Law.

[1. Under the old law there could not have been a *distress* for tithes, but under the new law the mode of recovering the rent-charge in arrear, is, as will be seen below, by distraining for it in the same manner as a landlord recovers his rent. When the rent-charge has been twenty-one days in arrear its owner may distrain, but not for more than two years' rent-charge; and if the rent-charge shall have been forty days in arrear, possession of the land may be given to the owner of the rent-charge, until the arrears and costs are satisfied (*o*).

[2. If the interest of the owner of the rent-charge shall have ceased before the 1st of January or 1st of July (the appointed times of payment), such owner or his representative will be entitled to a proportional part of the rent-charge for the time which may have elapsed from the last day of payment to the time of his interest determining (*p*).

[3. If the lands be uncultivated they are nevertheless liable to the rent-charge, but not if they have been wasted away by the sea or otherwise destroyed by any natural casualty.

[4. Where a rent charge is payable to a spiritual incumbent, a portion of land not exceeding twenty acres may be given in lieu of all or part of the rent-charge (*q*).

[5. The rent-charge may at the request of the land-owner (certain forms being observed) be confined to a part of the land, or the whole of which it may have been apportioned; the value of such land being treble the value of the apportioned rent-charge (*r*).

[6. Tithes, or rent-charge in lieu thereof, may in certain instances be merged (*s*) in land. Tithes by 13 Eliz. c. 10, s. 3, could not have been so merged (*t*). But (*u*) "impropriate tithes are still kept distinct from the land, and notwithstanding unity of possession, they continue to be held under separate titles. In conveyances and wills made subsequently to the

Conveyances
and Wills of
Tithes.

(*l*) [6 & 7 Will. 4, c. 71, s. 58.]

(*m*) [1 Vict. c. 69, s. 10.]

(*n*) [6 & 7 Will. 4, c. 71, s. 10.]

(*o*) [Vide post, 6 & 7 Will. 4, c. 71, ss. 81, 82.]

(*p*) Vide post, 6 & 7 Will. 4, c. 71, s. 86.]

(*q*) Vide post, 6 & 7 Will. 4, c. 71, s. 85.]

(*r*) Vide post, 6 & 7 Will. 4, c. 71, ss. 58, 72.]

(*s*) [Vide 6 & 7 Will. 4, c. 71, s. 29, post, p. 726.]

(*t*) [Vide title *Leases*, vol. ii. p. 384.]

(*u*) This an extract from a valuable note of Mr. Shelford's, in his work on the Tithe Commutation Acts.—Ed.]

purchase of the tithes by the owner of the land, they will not pass unless they be expressly named. In consequence of inattention to that circumstance, and an apprehension that after the purchase of the tithes the land was tithe free, the tithes have not in many cases been mentioned in subsequent wills and conveyances; by which omission, the intention that the land should pass discharged of tithes has been defeated, the tithes going in one line, and the land subject to the revived burden of tithes in another. The real property commissioners proposed that the owner, having the legal and beneficial estate in fee in tithes, should have power given to him of merging those tithes in the land, and that the land for ever thereafter should be discharged of tithes (*x*). The above suggestion, however, has not been carried into effect by the recent statutes relating to real property.

[“The same thing may happen with respect to the rent-charges allotted to impropriators, or purchased by the owners of lands; and unless the tithes or rent-charges be extinguished by a declaration made under the 71st section of the above act, it will be necessary to name expressly the rent-charge in lieu of tithes in conveying the lands upon which it is charged.

Wills of
Tithes before
1st Jan. 1838.

Since that
period.

Leases and
Agreements
under Tithe
Commutation
Acts.

[“Where impropriators have by their wills, made before the 1st January, 1838, devised lands, and the tithes issuing out of them, and intend their devisees to have the benefit of the rent-charge, it will not be proper to extend the operation of such wills by an express devise of the rent-charge after the commutation shall be completed. The provisions of the stat. 7 Will. 4 & 1 Vict. c. 26, are applicable to all wills made or republished on or after the 1st January, 1838. Under that act, the wills of testators may be applicable to tithe commutation rent-charges not agreed upon at the time of the making of the will, if it contain any devise of real estate which can be construed to extend to such rent-charges.”

[7. In all leases and agreements made subsequently to the commutation of tithes into rent-charge, the *landlord* is liable to the payment of the rent-charge instead of the occupying tenant (*y*).

[V. *Of the Rent-charge substituted for Tithes.*

6 & 7 Will. 4.
c. 71.

[The 6 & 7 Will. 4, c. 71, after providing that the land-owners shall appoint the valuers of the tithes to be commuted, enacts by sect. 33,

Valuers to
apportion the
Rent-charge.

[“That, as soon as may be after the choosing of such valuer or valuers, and after the confirmation of the said agreement, the valuer

(*x*) [*Vide* 1st Real Property Rep. pp. 55, 56.]

(*y*) [*Vide post*, 6 & 7 Will. 4, c. 71, s. 80.]

or valuers so chosen shall apportion the total sum agreed to be paid by way of rent-charge instead of tithes, and the expenses of the apportionment, amongst the several lands in the said parish, according to such principles of apportionment as shall be agreed upon at the meeting at which the valuer or valuers shall be chosen, or if no principles shall be then agreed upon for the guidance of the valuer or valuers, then, having regard to the average titheable produce and productive quality of the lands, according to his or their discretion and judgment, but subject in each case to the provisions hereinafter contained, and so that in each case the several lands shall have the full benefit of every modus and composition real, prescriptive, and customary payment, and of every exemption from, or non-liability to tithes relating to the said lands respectively, and having regard to the several tithes to which the said lands are severally liable.”

6 & 7 Will. 4,
c. 71.

[And by sect. 36 & 37 :

“That after the first day of October, one thousand eight hundred and thirty-eight, the commissioners shall proceed in manner herein-after mentioned, at such time and in such order as to them shall seem fit, either by themselves or by some assistant commissioner, to ascertain and award the total sum to be paid by way of rent-charge instead of the tithes of every parish in England and Wales, in which no such agreement binding upon the whole parish as aforesaid shall have been made and confirmed as aforesaid : provided nevertheless, that if any proceeding shall be had towards making and executing any such agreement after the commissioners shall have given or caused to be given notice of their intention to act as aforesaid in such parish, the commissioners may refrain from acting upon such notice, if they shall think fit, until the result of such proceeding shall appear.”

After 1st October, 1838, Commissioners may ascertain total Value of Tithes in any Parish in which no previous Agreement has been made.

[Sect. 37. “That in every case in which the commissioners shall intend making such award, notice thereof shall be given in such manner as to them shall seem fit ; and after the expiration of twenty-one days after such notice shall have been given, the commissioners or some assistant commissioner shall, except in the cases for which provision is hereinafter made, proceed to ascertain the clear average value (after making all just deductions on account of the expenses of collecting, preparing for sale and marketing, where such tithes have been taken in kind,) of the tithes of the said parish, according to the average of seven years preceding Christmas in the year one thousand eight hundred and thirty-five : provided, that if during the said period of seven years, or any part thereof, the said tithes or any part thereof shall have been compounded for or demised to the owner or occupier of any of the said lands in consideration of any rent or payment instead of tithes, the amount of such composition, or rent or sum agreed to be paid instead of tithes, shall be taken as the clear value of the tithes included in such composition, demise or agreement, during the time for which the same shall have been made ; and the commissioners or assistant commissioner shall award the average annual value of the said seven years so ascertained as the sum to be taken for calculating the rent-charge to be paid as a permanent commutation of the said tithes :

Value of Tithes to be calculated upon an Average of Seven Years.

6 & 7 Will. 4,
c. 71.

Tithes to be
Valued with-
out Deduction
on account
of Parochial
and County
Rates, &c.

provided also, that whenever it shall appear to the commissioners that the party entitled to any such rent or composition shall in any one or more of the said seven years have allowed and made any abatement from the amount of such rent or composition, on the ground of the same having in any such year or years been higher than the sum fairly payable by way of composition for the tithe, but not otherwise, then and in every such case such diminished amount, after making such abatements as aforesaid, shall be deemed and taken to have been the sum agreed to be paid for any such year or years; provided also, that in estimating the value of the said tithes, the commissioners or assistant commissioner shall estimate the same without making any deduction therefrom on account of any parliamentary, parochial, county, and other rates, charges, and assessments, to which the said tithes are liable; and whenever the said tithes shall have been demised or compounded for on the principle of the rent or composition being paid free from all such rates, charges, and assessments, or any part thereof, the said commissioners or assistant commissioner shall have regard to that circumstance, and shall make such an addition on account thereof as shall be an equivalent."

[The same rule with respect to rates is directed to be pursued in sections 40, 41, 43. And by sect. 69, the rent-charge is to be liable to the same rates as the tithes commuted have been (*y*).

Form of Ap-
portionment.

[Sect. 55. "That a draught of every apportionment shall be made, and shall set forth the agreement or award, as the case may be, upon which such apportionment is founded, and every schedule thereunto annexed; and the said draught or some schedule thereunto annexed, whether made by or under the direction of the valuers or commissioners or assistant commissioners, shall state the name or description and the true or estimated quantity in statute measure of the several lands to be comprised in the apportionment, and shall set forth the names and description of the several proprietors and occupiers thereof, and whether the said several lands are then cultivated as arable, meadow, or pasture land, or as wood land, common land, or howsoever otherwise, and shall refer, by a number set against the description of such lands, to a map or plan to be drawn on paper or parchment, and the same number shall be marked on the representation of such lands in the said map or plan; and the draught of the apportionment shall also state the amount charged upon the said several lands, and to whom and in what right the same shall be respectively payable."

[But by sect. 72, a power of altering the apportionment is given to the commissioners of the land-tax, at the request of the land owners.

Comptroller
of Corn Re-
turns to pub-

[Sect. 56. "That immediately after the passing of this act, and also in the month of January in every year, the comptroller of corn

(*y*) [By sect. 38, a power was given to the commissioners to increase or diminish the sum to be paid for commutation, and a report was ordered to be laid before parliament on the mode of exercising this power, which was accordingly done.—Ed.]

returns for the time being, or such other person as may from time to time be in that behalf authorized by the privy council, shall cause an advertisement to be inserted in the London Gazette, stating what has been, during seven years ending on the Thursday next before Christmas day then next preceding, the average price of an imperial bushel of British wheat, barley, and oats, computed from the weekly averages of the corn returns.”

6 & 7 Will. 4,
c. 71.
lish Average
Price of Corn.

[Sect. 57. “That every rent-charge charged upon any lands by any such intended apportionment shall be deemed at the time of the confirmation of such apportionment, as hereinafter provided, to be of the value of such number of imperial bushels and decimal parts of an imperial bushel of wheat, barley, and oats, as the same would have purchased at the prices so ascertained by the advertisement to be published immediately after the passing of this act, in case one-third part of such rent-charge had been invested in the purchase of wheat, one third part thereof in the purchase of barley, and the remaining third part thereof in the purchase of oats, and the respective quantities of wheat, barley, and oats, so ascertained, shall be stated in the draught of every apportionment.”

Rent-charges
to be valued
according to
the Average
Price of Corn.

[By 7 Will. 4 & 1 Vict. c. 69 s. 7, these prices are settled to be
[“The prices at which the conversion from money into corn is to be made, at the time of the confirmation of each apportionment, according to the provisions of the said act, are seven shillings and one farthing for a bushel of wheat (z), three shillings and eleven pence halfpenny for a bushel of barley, and two shillings and nine pence for a bushel of oats.”

Prices at
which Con-
version from
Money into
Corn is to be
made.

[And by 6 & 7 Will. 4, c. 71, it is enacted,

[Sect. 63. “That after such proceedings as aforesaid shall have been had, and all such objections, if any, shall have been finally disposed of, the commissioners or assistant commissioner shall cause the instrument of apportionment to be ingrossed on parchment, and shall annex the map or plan thereunto belonging to the ingrossed instrument of apportionment, and shall sign the instrument of apportionment and the map or plan, and shall send both to the office of the commissioners; and if the commissioners shall approve the apportionment, they shall confirm the instrument of apportionment under their hands and seal, and shall add thereunto the date of such confirmation.”

Confirmation
by the Com-
missioners.

[Sect. 64. “That two copies of every confirmed instrument of apportionment, and of every confirmed agreement for giving land instead of any tithes or rent-charge, shall be made and sealed with the seal of the said commissioners, and one such copy shall be deposited in the registry of the diocese within which the parish is situated, to be there kept among the records of the said registry, and the other copy shall be deposited with the incumbent and church or chapel wardens of the parish for the time being, or such other fit persons as the commissioners shall approve, to be kept by them and their successors in office with the public books, writings, and papers of the parish; and all persons interested therein may have access to and be furnished with copies of or extracts from any such copy, on giving reasonable notice to the person having custody of the same, and on payment of two shillings and sixpence for such

Transcripts
of the Award
to be sent to
the Registrar
of the Dio-
cese and to
the Incum-
bent and
Churchward-
ens.

(z) [The Gazette (Dec. 9, 1836) made this 7s. 1½d.—ED.]

6 & 7 Will. 4,
c. 71.

Confirmed
Agreements,
&c. not to be
questioned.

Lands to be
discharged
from Tithes,
and Rent-
charge paid
in lieu
thereof.

Payment of
Rent-charge
on reclaimed
Lands to be
postponed
until Tithes
would have
been due.

inspection, and after the rate of three-pence for every seventy-two words contained in such copy or extract; and every recital or statement in or map or plan annexed to such confirmed apportionment or agreement for giving land, or any sealed copy thereof, shall be deemed satisfactory evidence of the matters therein recited or stated, or of the accuracy of such plan."

[Sect. 66. "That no confirmed agreement, award, or apportionment, shall be impeached after the confirmation thereof, by reason of any mistake or informality therein, or in any proceedings relating thereunto."

[Sect. 67. "That from the first day of January next following the confirmation of every such apportionment the lands of the said parish shall be absolutely discharged from the payment of all tithes, *except so far as relates to the liability of any tenant at rack-rent dissenting as hereinafter provided*(a), and instead thereof there shall be payable thenceforth to the person in that behalf mentioned in the said apportionment a sum of money equal in value, according to the prices ascertained by the then next preceding advertisement, to the quantity of wheat, barley, and oats, respectively mentioned therein to be payable instead of the said tithes, in the nature of a rent-charge issuing out of the lands charged therewith; and such yearly sum shall be payable by two equal half-yearly payments on the first day of July and the first day of January in every year; the first payment, except in the case of barren reclaimed lands, as hereinafter provided, being on the first day of July next after the lands shall have been discharged from tithes as aforesaid; and such rent-charge may be recovered at the suit of the person entitled thereto, his executors or administrators, by distress and entry as hereinafter mentioned; and after every first day of January the sum of money thenceforth payable in respect of such rent-charge shall vary so as always to consist of the price of the same number of bushels and decimal parts of a bushel of wheat, barley, and oats, respectively, according to the prices ascertained by the then next preceding advertisement; and any person entitled from time to time to any such varied rent-charge shall have the same powers for enforcing payment thereof as are herein contained concerning the original rent-charge: Provided always, that nothing herein contained shall be taken to render any person whomsoever personally liable to the payment of any such rent-charge: Provided always, that the rent-charge which shall be apportioned upon any lands in the said parish which, during any part of the said period of seven years preceding Christmas one thousand eight hundred and thirty-five, were exempted from tithes by reason of having been inclosed under any act of parliament, or converted from barren heath or waste ground, shall be payable for the first time on the first day of July or first day of January next following the confirmation of the apportionment which shall be nearest to the time at which tithes were or would have become payable for the first time in respect of the said lands, if no commutation thereof had taken place."

[The words in this clause "except so far as relates to the liability of any tenant at rack-rent as hereinafter provided" refer to sect. 79.

(a) [See sect. 80, next page.]

[Sect. 79. "That any tenant or occupier who at the time of such commutation shall occupy at rack-rent any lands of which the tithes shall be so commuted, may, within one calendar month next after the confirmation of the apportionment by the commissioners, signify, by writing under his hand given to or left at the usual residence of his landlord or his agent, his dissent from being bound to pay any rent-charge apportioned and charged on the said lands as aforesaid; and in that case such landlord shall be entitled, from the time when the said apportionment shall take effect, and during the tenancy or occupation of such tenant or occupier, to stand, as to the perception and collection of tithes, or receipt of any composition instead thereof, in the place of the owner of the tithes so commuted, and to have all the powers and remedies for enforcing render and payment of such tithes or composition which the tithe owner would have had if the commutation had not taken place."

6 & 7 Will. 4,
c. 71.

If Tenant of
Lands at
Rack-Rent
dissent from
paying the
Rent-charge,
the Landlord
may take the
Tithes during
the Tenancy.

[Sect. 80. "That any tenant or occupier at the time of such commutation who shall have signified his dissent from being bound to pay any such rent-charge as aforesaid, or who shall hold his lands under a lease or agreement providing that the same shall be holden and enjoyed by him free of tithes, and every tenant or occupier who shall occupy any lands by any lease or agreement made subsequently to such commutation, and who shall pay any such rent-charge, shall be entitled to deduct the amount thereof from the rent payable by him to his landlord, and shall be allowed the same in account with the said landlord."

Tenant pay-
ing Rent-
charge to be
allowed the
same in ac-
count with his
Landlord.

[By 2 & 3 Vict. c. 62, s. 11, power is given to substitute a *fixed* for a *contingent* rent-charge in the cases of exempt and crown lands.

[Sect. 11. "That where lands are exempted from the payment of tithes, or of rent-charge instead of tithes, whilst in the occupation of the owner of such lands, by reason of having been parcel of the possessions of any privileged order, it shall be lawful for the respective owners of the said lands and tithes or rent-charge, by the parochial agreement for the rent-charge, or by a supplemental agreement in cases where the parochial agreements or any award shall have been confirmed by the said commissioners, to be made in such form as the commissioners shall direct or approve, to agree to the payment, or for the commissioners in the case of a compulsory award, with the consent of the respective owners of the said lands and tithes, to award the payment of a fixed and continuing rent-charge, without regard to the change of occupation or manurance of such lands, equivalent in value, according to the judgment of the commissioners, to such contingent rent-charge; and such lands shall, from the date of the confirmation by the commissioners of such parochial agreement or supplemental agreement or award, as the case may be, or from such date as shall be fixed by the parties, with the approval of the said commissioners, in any such agreement or supplemental agreement, be subject to such fixed rent-charge instead of the contingent tithes or rent-charge to which such lands were subject previous to such agreement or supplemental agreement or award being made; and every such fixed rent-charge shall from such period respectively be paid and recoverable by the means

Fixed Rent-
charge may
be substituted
for contingent
Rent-charge
on Lands par-
tially exempt.
6 & 7 Will. 4,
c. 71, s. 71.

provided in the said acts, in like manner as if the same had been the rent-charge originally fixed in any parochial agreement or award in respect of the said tithes."

Provisions of
6 & 7 Will. 4,
c. 71, ss. 43
and 71, for
substituting
fixed Rent-
charge ex-
tended to
Crown Lands.

[Sect. 12. "And whereas certain crown lands, by reason of their being of the tenure of ancient demesne or otherwise, are exempted from payment of tithes whilst in the tenure, occupation, or manurance of her Majesty, her tenants, farmers, or lessees, or their under-tenants, as the case may be, but become subject to tithes when alienated or occupied by subjects not being tenants, farmers, or lessees of the crown, and doubts have arisen how far the provisions of the said first-recited act relating to lands heretofore parcel of the possessions of any privileged order, or in the nature of glebe, or otherwise in like manner privileged and partially exempt, are applicable to such crown lands; be it declared and enacted, that all and every the said provisions of the said first-recited act do extend to such crown lands, and that the provision lastly in this act contained for substituting a fixed rent-charge instead of a contingent rent-charge on lands partially exempt from tithes shall extend and be applicable to such crown lands as aforesaid: Provided always, that no such fixed rent-charge shall be substituted instead of such contingent rent-charge on such crown lands without the consent of the persons or officers who are by the said first-recited act respectively required to be substituted in cases of commutation of tithes where the ownership of lands or tithes is vested in her Majesty." (a)]

[The 4 & 5 Vict. c. 39, "An Act for amending the Acts relating to the Ecclesiastical Commissioners," enacts by s. 29, that

Construction
of the Terms
'Lands,' &c.

"For the purpose of removing all doubts respecting the meaning of the terms 'real estates,' 'lands,' and 'lands, tenements, and hereditaments,' be it declared and enacted, That the said terms, wherever they occur, either in the recital or in the enactments of either of the said recited acts, or in any scheme, or any order of her Majesty in council, prepared and issued under the authority of those acts or either of them, shall respectively be construed to include and comprehend lands, tithes, tenements, and other hereditaments, except any right of ecclesiastical patronage; and that the said first-mentioned terms, and also the term 'lands, tithes, tenements, or other hereditaments,' in any part of either of the said recited acts or in this act or in any such scheme or order in council contained, shall be construed to apply and extend to lands, tithes, tenements, and other hereditaments, as well in reversion as in possession, and to any leasehold interest therein; and that the term 'tithes' in either of the said acts or in this act contained shall extend to and comprehend rents-charges allotted or assigned in lieu of tithes; and the ecclesiastical commissioners for England shall, in respect of all lands, tithes, tenements, or other hereditaments, endowments, or emoluments, already vested or liable to be vested in them by or under the provisions of either of the said acts or of this act, be deemed to be the owners or joint owners thereof respectively, as the case may be, for all the purposes of an act passed

Provisions of
Tithe Com-
mutation
Acts ex-
tended to
Commis-
sioners.

(a) This removes certain doubts created by s. 43 and 71 of 6 & 7 Will. 4, c. 71.

in the seventh year of the reign of his late majesty King William the Fourth, intituled 'An Act for the Commutation of Tithes in England and Wales,' and of the several acts to explain and amend the same."

[VI. *Power to sell Farm Buildings and Sites.*

[6 & 7 Will. 4, c. 71, s. 87, enacts—

["That if any barns or buildings belonging to any tithe owner having a limited estate or interest therein, which shall have been generally used for the housing of tithes paid in kind, shall be rendered in the whole or in part useless by reason of any commutation of tithes under this act, it shall be lawful for every such tithe owner (with the consent, nevertheless, of the commissioners, and subject to such directions as they may give, to be signified under their hands and seal,) to pull down any such barns or buildings or any part thereof, and to sell and dispose of the materials, and to sell and dispose of all or any of such barns or buildings, and the site thereof, and either with or without any farm buildings or homesteads thereunto belonging, in such manner as the commissioners may direct; and upon payment of the consideration money it shall be lawful for every such tithe owner (with such consent as aforesaid) to convey and deliver the premises sold as aforesaid to the purchaser thereof, or to such uses and in such manner as such purchaser shall direct; and the consideration money in each case shall be paid to such tithe owner, and his receipt shall be a good discharge to the purchaser; and such tithe owner shall lay out and invest the consideration money in such manner and for such trusts as the commissioners shall direct for the benefit of the persons entitled to the said rent-charge."

Provision for the Sale of Buildings and the Sites thereof rendered useless or unnecessary by the Commutation of Tithes.

[And 2 & 3 Vict. c. 62, extends these provisions to collegiate and corporate bodies.

[Sect. 15. "That all the provisions in the recited acts or any of them in any way relating to or enabling the pulling down or sale of barns and buildings generally used for housing tithes paid in kind, and the sale of the materials and the site thereof, either with or without any farm buildings or homesteads thereto belonging, and for the conveyance and delivery thereof, and for securing the consideration money for the benefit of the persons thereunto entitled, shall apply to and may be made available by any corporate body or person, whether as trustees or otherwise, by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or any other having any spiritual or ecclesiastical living, being seised or possessed of any such barns or buildings, or the site thereof, notwithstanding anything in a certain statute made in the thirteenth year of the reign of Queen Elizabeth, for making void fraudulent deeds made by spiritual persons to defeat their successors of remedy for dilapidations, or in any other statute."

Recited Acts extended to Collegiate Bodies &c., notwithstanding restraining Statute.

13 Eliz. c. 10.

4 & 5 Vict.
c. 39.

6 & 7 Will. 4,
c. 71.

[VII. *Rent Charge on Lammas Lands and Commons in Gross.*

[By 2 & 3 Vict. c. 62, s. 13, it is enacted as follows :

Provision for
Tithes of
Lammas
Lands, &c.

[Sect. 13. “ ‘ Whereas large tracts of land called lammas lands are in the occupation of certain persons during a portion of the year only, and are liable to the tithes of the produce of the said lands increasing and growing thereon during such occupation, and at other portions of the year are in the occupation of other persons, and in their hands liable to different kinds of tithes arising from the agistment, produce, or increase of cattle or stock thereon ; and by reason of such change of occupation such last-mentioned tithes cannot be commuted for a rent-charge issuing out of or fixed upon the said lands, and the said recited acts are thereby rendered inoperative in the several parishes where such lammas lands lie : And whereas the said acts are in like manner inoperative in certain cases where a personal right of commonage, or a right of common in gross, is vested in certain persons by reason of inhabitancy or occupation in the parish where any common may lie, or by custom or vicinage, but without having such right of common so annexed or appurtenant to or arising out of or in respect of any lands on which any rent-charge could be fixed instead of the tithes of the cattle or stock, or their produce, increase, or agistment, on such common, annexed to such personal right ;’ for remedy thereof be it enacted, That in every case where by reason of the peculiar tenure of such lands, and the change during the year of the occupiers thereof, or of such right of commonage, a rent-charge cannot, in the judgment of the said commissioners, be fixed on the said lands in respect of cattle and stock received and fed thereon, or of the produce and increase of such cattle and stock, at such portion of the year as the said lands are thrown open, or where such right of commonage alone exists, it shall be lawful for the parties interested in such lands or commons and the tithes thereof in the case of a parochial agreement, or for the commissioners in the case of a compulsory award, in every such parochial agreement or award respectively, or by any supplemental agreement in the nature of a parochial agreement, or by a supplemental award, as the case may be, where any parochial agreement or award has been already made, to fix a rent-charge instead of the tithes of such lammas land or commons, to be paid during the separate occupation thereof by the separate occupiers, in like manner as other rent-charges are fixed by the said acts or any of them, and to declare in such agreement or award, or supplemental agreement or award, as the case may be, such a sum or rate per head to be paid for each head of cattle or stock turned on to such lammas land or commons by the parties entitled to the occupation thereof after the same shall have been so thrown open, or by the parties entitled to such right of commonage as aforesaid ; and every such sum shall be ascertained and fixed upon a calculation of the tithes received in respect of such last-mentioned occupation or right for the period and according to the provisions for fixing rent-charges in the said recited acts,

and shall be due and payable by the owner of such cattle or stock on the same being first turned upon such lands or commons, and shall be recoverable by the persons entitled thereto by distress and impounding of the cattle or stock in respect of which such sum shall be due, in like manner as cattle are distrained and impounded for rent, and be subject to the same provisions as to distress and replevin of the same as are by law provided in cases of distress for rent: Provided always, that nothing herein contained shall extend to lammas lands where no tithes or payments instead of tithes have been taken during the seven years ending at Christmas one thousand eight hundred and thirty-five in respect of the cattle or stock received and fed thereon, or of the produce and increase of such cattle or stock at such portion of the year as the said lands are thrown open."

2 & 3 Vict.
c. 62.

[VIII. *Rent Charge on Allotments in Lieu of Rights of Common.*

[By 2 & 3 Vict. c. 62, s. 14, it is enacted,

[" ' And whereas in certain cases of commons hereafter to be inclosed allotments may be made in respect of tenements and hereditaments to which a right of going on such common is appendant or appurtenant, the tithes whereof would be chargeable on the tenements or hereditaments in respect of which such allotments may be made, and such tenements or hereditaments are not of themselves an adequate security for the rent charge to be fixed in respect of such tithes ;' be it therefore declared and enacted, That in every such case the rent-charge to be fixed instead of such tithes shall be a charge upon and recoverable out of any allotments to be in future made in respect of such rights, as well as upon such tenements or hereditaments in respect of which such allotments are made, and by the same ways and means as are provided for the recovery of rent-charges by the said acts or any of them, or this act."

Rent-charge in respect of Tithes of Common appurtenant to be a Charge on the allotments made in respect of the Lands to which Right of Common attached.

[IX. *Fruit and Hop Plantations.*

[By sect. 40 of 6 & 7 Will. 4, c. 71, the commissioners were empowered to make a separate valuation of the hop grounds, orchards, or gardens, according to the average rate of composition for the tithes of similar lands during seven years preceding Christmas, 1835, within a certain district. By sect. 42 an *ordinary* and extraordinary charge for tithes was to be fixed for hop grounds or market gardens. Hop grounds or market gardens going out of cultivation were to be subject to such *ordinary* charge ; but such as were newly cultivated after the commutation, were to undergo the *extraordinary* charge.

How the Tithe of Hops, Fruit, and Garden Produce is to be valued.

[Sect. 40. " That in case any of the lands in the parish shall be

6 & 7 W. 4,
c. 71.

hop grounds, orchards, or gardens, and notice shall be given by the owner thereof to the commissioners or assistant commissioner acting in that behalf that the tithes thereof shall be separately valued, the commissioners or assistant commissioner shall estimate the value of the tithes thereof according to the average rate of composition for the tithes of hops, fruit, and garden produce respectively during seven years preceding Christmas in the year one thousand eight hundred and thirty-five, within a district to be assigned in each case by the commissioners or assistant commissioner, and estimating the same as chargeable to all parliamentary, parochial, county, and other rates, charges, and assessments to which the said tithes are liable, and shall add the value so estimated to the value of the other tithes of the parish ascertained as aforesaid."

Provision for
the Change of
Culture of
Hop Grounds
and Market
Gardens.

Sect. 42. "That the amount which shall be charged by any such apportionment as hereinafter provided upon any hop grounds or market gardens in any district so to be assigned shall be distinguished into two parts, which shall be called the ordinary charge and the extraordinary charge, and the extraordinary charge shall be a rate per imperial acre, and so in proportion for less quantities of ground, according to the discretion of the valuers or commissioners or assistant commissioner by whom the apportionment shall be made as aforesaid; and all lands whereof the tithes shall have been commuted under this act, and which shall cease to be cultivated as hop grounds or market gardens at any time after such commutation, shall be charged after the thirty-first day of December next following such change of cultivation only with the ordinary charge upon such lands; and all lands in any such district the tithes whereof shall have been commuted under this act, and which shall be newly cultivated as hop grounds or market gardens at any time after such commutation, shall be charged with an additional amount of rent-charge per imperial acre, equal to the extraordinary charge per acre upon hop grounds or market gardens respectively in that district; provided always, that no such additional amount shall be charged or payable during the first year, and half only of such additional amount during the second year, of such new cultivation; and an additional rent-charge by way of extraordinary charge upon hop grounds and market gardens, newly cultivated as such, beyond the limits of every district in which any extraordinary charge for hop grounds or market gardens respectively shall have been distinguished as aforesaid at the time of the commutation, shall be charged by the commissioners at the time of such new cultivation, upon the request of any person interested therein, if such new cultivation shall have taken place during the continuance of the commission of the said commissioners, and after the expiration of the commission shall be charged in such manner and by such authority as parliament shall direct, and shall be payable and recoverable in like manner and subject to the same incidents in all respects as an extraordinary charge charged upon any hop grounds or market gardens at the time of commutation."

[But no provision is made in these clauses for the contingency of a change of cultivation in orchards and fruit planta-

tions. The 2 & 3 Vict. c. 62, supplied this defect, enacting as follows:

2 & 3 Vict.
c. 62.

[Sect. 26. "That in case any of the lands in a parish the tithes whereof shall be in course of commutation under the provisions of the said first-recited act shall be orchards or fruit plantations, and notice in writing, under the hands of any of the owners thereof whose interest therein shall not be less than two thirds of the whole of the orchards and fruit plantations in such parish, shall be given to the valuers or commissioners or assistant commissioner by whom any apportionment provided for by the said act shall be made at any time before the draught of such apportionment shall be framed that the tithes thereof should be distinguished into two parts, the amount which shall be charged by any such apportionment upon the several orchards and fruit plantations in such parish shall be distinguished into two parts accordingly, and the same shall be called the ordinary charge and the extraordinary fruit charge; and the extraordinary charge shall be a rate per imperial acre, and so in proportion for less quantities of ground, according to the discretion of the valuers or commissioners or assistant commissioner by whom such apportionment shall be made as aforesaid."

Provision for
dividing the
Tithe of Fruit
Plantations in
certain Cases.

[Sect. 27. "That all lands the tithes whereof shall have been commuted under the said act, which shall be situate within the limits of any parish in which an extraordinary fruit charge shall have been distinguished as aforesaid at the time of commutation, and which shall be newly cultivated as orchards or fruit plantations at any time after such commutation, shall be charged with an additional amount of rent-charge per imperial acre equal to the extraordinary fruit charge per acre in that parish: Provided always, that no such additional amount shall be charged in respect of any plantation of apples, pears, plums, cherries, and filberts, or of any one or more of those fruits, during the first five years, and half only of such additional amount during each of the next succeeding five years, of such new cultivation thereof; and that no such additional amount shall be charged in respect of any plantation of gooseberries, currants, and raspberries, or of any one or more of those fruits, during the first two years, and half only of such additional amount during each of the next succeeding two years, of such new cultivation thereof; and that no such additional amount shall be charged in respect of any mixed plantation of apples, pears, plums, cherries, or filberts, and of gooseberries, currants, or raspberries during the first three years, and half only of such additional amount during each of the next succeeding three years, of such new cultivation thereof."

Newly-culti-
vated Fruit
Plantations to
be charged
an additional
Sum.

[Sect. 28. "That all lands the tithes whereof shall have been commuted as aforesaid, which shall be situated within the limits of any parish in which an extraordinary fruit charge shall have been distinguished as aforesaid, and which shall cease to be cultivated as orchards or fruit plantations at any time after such commutation, shall be charged, after the thirty-first day of December next following such change of cultivation, only with the ordinary charge upon such lands."

Orchards, &c.
displanted to
be relieved
from addi-
tional Charge.

[Sect. 29. "That in case any lands within the limits of a parish

Provision for

2 & 3 Vict.
c. 62.

mixed Plan-
tations of
Hops and
Fruit.

When Land
subject to
Rectorial and
Vicarial
Tithe, acre-
able Rent-
charge to be
fixed.

Provision for
future mixed
Plantations.

How the
Rent-charge
for Hops and
Fruit may be
fixed in cer-
tain Cases.

Provision for
giving Effect
to Parochial
Agreements,
and Pro-
ceedings
thereon in
certain Cases
of extraor-
dinary
Charge.

in which an extraordinary fruit charge shall have been distinguished as aforesaid shall have been or shall at any time be planted with fruit, and also with hops, the same shall, during the continuance of such mixed plantation of hops and fruit, be liable to the extraordinary hop charge only, or to the extraordinary fruit charge only, payable in respect of the same lands, not to both those charges; and that the extraordinary charge to which the lands so planted shall be liable shall be the higher of the two for the time being."

[Sect. 30. "That where any land liable to any such extraordinary charge for the tithes of a mixed plantation of hops and fruit shall at the time of the commutation produce both rectorial and vicarial tithes payable to different persons, the apportionment shall set out the same, distinguishing the amount of ordinary and extraordinary charge payable to each tithe owner, and shall divide the whole acreable extraordinary charge between such tithe owners, according to the quantity of land producing rectorial tithe, and the quantity producing vicarial tithe."

[Sect. 31. "That in all cases in which there shall be hereafter mixed plantations of hops and of such fruit as aforesaid in any parish or district in which an extraordinary fruit charge shall have been declared, the rectorial and vicarial tithes whereof but for the commutation would have been payable to different owners, the extraordinary charge payable in respect of the tithes of such mixed plantation shall be divided between such owners in proportion to the extent of land occupied by that produce which would have paid tithes to each of them respectively: Provided always, that payment of the share of each tithe owner, when so ascertained, shall be taken to be subject to the provisions contained in the said first-recited act and in this act, for lessening the amount of extraordinary charge payable in respect of hop gardens and orchards respectively at the beginning of such cultivation."

[Sect. 32. "That for the purpose of fixing any charge for the tithes of hops or fruit, or of any mixed plantation as aforesaid, the commissioners may, if they see fit, assign the parish or lands in respect of which due notice shall have been given, requiring the tithes thereof to be separately valued, as required by the said first recited act, or any part or parts of such parish or lands, as a district under the provisions of the said act, and may fix a charge upon such lands in respect of the tithes of hops or fruit as the rent-charge to prevail and to be established in respect of the same, without specific reference in the award to any other parish or lands, but having regard nevertheless to the general amount of compositions which they shall find to have prevailed in other parishes of a similar description, and not to the money payments in the parish under consideration, or the value of the tithes in kind therein."

[Sect. 33. "That the provisions of the said first-recited act for distinguishing rent-charges apportioned upon lands cultivated as hop grounds into two parts, and for relieving lands from and subjecting the same to an extraordinary charge when ceased to be cultivated, and when newly cultivated as such, respectively shall be held to extend to parochial agreements already or hereafter made, and to the proceedings consequent thereupon, and to the lands dis-

charged from tithes by virtue thereof; and that every such agreement and proceeding, whereby any district has been or shall be assigned for establishing or distinguishing into two parts any rent-charge in respect of lands, cultivated as aforesaid, shall be deemed valid, operative, and effectual for all the purposes of the said recited acts and of this act, and that every district assigned by virtue thereof shall be deemed a district duly assigned, and every rent-charge created thereby a valid rent charge for the like purposes."

[X. *Personal and Mineral Tithes, and certain Offerings, how far exempted from the Tithe Commutation Acts.*

[By 6 & 7 Will. 4, c. 71, s. 90, it is enacted,

["That nothing in this act contained, unless by special provision to be inserted in some parochial agreement and specially proved by the commissioners, in which case the same shall be valid, shall extend to any Easter offerings, mortuaries, or surplice fees, or to the tithes of fish or of fishing, or to any personal tithes other than the tithes of mills, or any mineral tithes, or to any payment instead of tithes arising or growing due within the city of London, or to any permanent rent-charge or other rent or payment in lieu of tithes, calculated according to any rate or proportion in the pound on the rent or value of any houses or lands in any city or town under any custom or private act of parliament, or to any lands or tenements the tithes whereof shall have been already perpetually commuted or extinguished under any act of parliament heretofore made."

Act not to extend to Easter Offerings, &c. or to Payments instead of Tithes in London, &c.

[Easter offerings are due of common right at the rate of 2*d.* per month; but by custom more may be due (*a*). They have been decreed to a plaintiff to be due of common right at the rate of 2*d.* a head for every person in the defendant's family of sixteen years of age and upwards (*b*). These offerings may be recovered before the magistrates under the statutes mentioned *post*, under sect. 13. See also title *Mortuaries*, vol. ii. p. 562. It has been seen that the first Tithe Commutation Act did not give any power to commute the subjects of this section, unless by some special provision, &c.; but by 2 & 3 Vict. c. 62, s. 9, it is enacted,

["That it shall be lawful, at any time before the confirmation of any apportionment after a compulsory award in any parish, for the land owners and tithe owners, having such interest in the lands and tithes of such parish as is required for the making a parochial agreement, to enter into a parochial agreement for the commutation of Easter offerings, mortuaries, or surplice fees, or of the tithes of fish, or fishing, or mineral tithes; and all the provisions, conditions, limitations, and powers of the said recited acts or any of them, relating to parochial agreements, so far as the same shall in the judgment of the commissioners be applicable to the

Power after Award to make Parochial Agreement for Easter Offerings, &c. 6 & 7 Will. 4, c. 71, s. 90.

(*a*) [*Lawrence v. Jones*, Bunb. Wood, 250; 2 Gw. 661.] 173; 2 Gw. 662; 1 E. & Y. 801, (*b*) [*Carthew v. Edwards*, Amb. 818; *Egerton v. Still*, Bunb. 198; 2 72; Gw. 826; 2 E. & Y. 818.]

subject of the proposed commutation, shall be observed and applied in every such case as if no previous award had been made; and every such agreement may fix the period at which the rent-charge to be paid under such agreement shall commence, but so nevertheless that the same and the subsequent payments thereof shall be made on some day fixed for the payment of the rent-charge awarded in such parish, and shall be recoverable from time to time by the means provided in the said acts or either of them for the recovery of the rent-charges in the said parish."—ED.]

Fish in
Ponds.

It doth not seem to be agreed, whether or how far fish in *ponds* or private fisheries are liable to pay tithes; and therefore the same must be referred to the customs of particular places.

Deer.

Rabbits.

Oysters.

But it seems that of these no tithe can be due, where no profit is made thereof, and where they are kept only for pleasure, or to be spent in the house or family; as fish kept in a pond generally are (c); [for they are like deer in a park, and rabbits in an inclosed warren, wild in their nature; and partaking of the realty, go to the heir (d). Oysters, or oyster lays or beds, are not tithable (e).—ED.]

Fish in
Rivers.

Also fish taken in common *rivers* are tithable only by custom (f).

And in this case Lindwood says it is only a personal tithe, and shall be paid to that church where he who taketh them heareth divine service and receiveth the sacraments (g).

Tithes of
Fish.

Where fish are taken in the *sea*, though they are *feræ naturæ*, and consequently not tithable of common right, yet by the custom of the realm they are tithable as a personal tithe, that is, not by the tenth fish, or in kind, but by some small sum of money in consideration of the profits made thereby after costs deducted (h).

In *Rex v. Carlyon* (i), it appears to be the custom in the parish of Paul in the county of Cornwall to pay one-tenth of all the fish caught and brought on shore within the parish; and where the court held that the proprietors of this tithe were rateable to the poor in respect of it (j).

Upon which foundation, it is said, that if the owners of a ship do lend it to mariners to go to an island for fish, and are in consideration of such loan to have a certain quantity of fish

(c) Bob. 135.

(d) *Nicholas v. Elliott*, Bunb. 19; 2 Br. P. C. 31; 1 Wood, 523; 1 E. & Y. 698; *Flower v. Vaughan*, Hett. 147; 1 E. & Y. 370.]

(e) [*Murray v. Skinner*, 1 Wood, 541; 1 E. & Y. 706.]

(f) God. 406; Wood, b. ii. c. 2.

(g) Lindw. 195. [*Vide post*, s. 11 of 2 & 3 Edw. 6, c. 13.]

(h) 1 Rolle's Abr. 636. [See also

Holland v. Neale, Noy, 108; 1 E. & Y. 156; *Stile's case*, 1 E. & Y. 361; *Thompson v. Field*, 1 E. & Y. 761; *Guavas v. Kelynach*, Bunb. 239, 256; 2 E. & Y. 1; Gw. 691; *Jones v. Cleveden*, 2 Wood, 283; *Earl of Scarborough v. Hunter*, Bunb. 43; 1 E. & Y. 747.

(i) 3 T. Rep. 385.

(j) For more of this custom, see Bunb. 43, 239, 256.

when they come back; no tithe shall be paid by the mariners for what is given to the owners, because they are only to pay for the clear gain (*k*).

[A custom that tithes in kind ought to be paid to the vicar for all sea fish taken or caught with any nets or boats that had been housed or wintered at or in the parish in the interval between the last preceding fishing season and the season during which the fish were caught or taken (whether such nets or boats were the property of parishioners or not) has been established (*l*). Unless there be a clear custom to the contrary, the tithe of fish taken in the sea appears to be payable to the parson of the parish where the fisherman resides (*m*).—*ED.*]

By a constitution of Archbishop Winchelsea, it is ordained, that “personal tithes shall be paid of artificers and merchandizers, that is, of the gain of their commerce; as also of carpenters, smiths, masons, weavers, inn-keepers, and all other workmen and hirelings, that they pay tithes of their wages; unless such hireling shall give something in certain to the use or for the light of the church, if the rector shall so think proper:” that is to say, they shall pay the tenth part of the profit, deducting first all necessary and reasonable expenses (*n*).

And by the statute of the 2 & 3 Edw. 6, c. 13, s. 7, “Every person exercising merchandizes, bargaining and selling, clothing, handicraft, or other art or faculty by such kind of persons, and in such places as heretofore within these forty years have accustomedly used to pay such personal tithes, or of right ought to pay (other than such as be common day labourers), shall yearly at or before the feast of Easter, pay for his personal tithes the tenth part of his clear gains; his charges and expenses, according to his estate, condition or degree, to be therein abated, allowed and deducted.”

2 & 3 Edw. 6,
c. 13.

Personal
Tithes.

Sect. 8. “Provided, that in all such places where handicraftsmen have used to pay their tithes within these forty years, the same custom of payment of tithes to be observed and continue.”

Sect. 9. “And if any person refuse to pay his personal tithes in form aforesaid, it shall be lawful to the ordinary of the diocese where the party is dwelling, to call the same party before him, and by his discretion to examine him by all lawful and reasonable means, other than by the party’s own corporal oath, concerning the true payment of the said personal tithes.”

Sect. 11. “Provided, that nothing in this act shall extend to any parish which stands upon and towards the sea coasts, the commodities and occupying whereof consisteth chiefly in fishing, and have by reason thereof used to satisfy their tithes

(*k*) *Gibs.* 679.

(*m*) [*Williams v. Baron*, 2 E. &

(*l*) [*Borlase v. Batten*, 2 E. & Y. 217; *Gw.* 931.]

Y. 300.]

(*n*) *Lind.* 195.

Tithes of
Fish.

by fish; but that all such parishes shall pay their tithes according to the laudable customs, as they have heretofore of ancient time within these forty years used and accustomed, and shall pay their offerings as is aforesaid."

Sect. 12. "Provided also, that nothing in this act shall extend in any wise to the inhabitants of the cities of London and Canterbury, and the suburbs of the same, nor to any other town or place that hath used to pay their tithes by their houses, otherwise than they ought or should have done before the making of this act."

This act restrains the canon law in three things: First, where the canon law was general, that all persons in all places should pay their personal tithes, the act restraineth it to such kind of persons only, as have accustomedly used to pay the same within forty years before the making of the act. Secondly, whereas by the ecclesiastical laws they might before this act have examined the party upon his oath concerning his gain, this act restrains that course, so that the party cannot be examined upon oath. Thirdly, by this act the day labourer is freed from the payment of his personal tithes (*o*).

It cannot be intended upon this act, that if such tithes have been sometimes paid within forty years, they are therefore due; but they must have been *accustomedly*, that is, constantly paid for forty years next before the act (*p*).

If it be demanded how such payment must now be proved forty years before the making of the act; the answer is, as in other like cases, *à posteriori*; by what has been done all the time of memory since the act (*q*).

Sir Simon Degge says, the only case that he could find for above a hundred years before his time, where the tithes of the profits of such trades were sued for by any clergyman, was that of *Dolley v. Davis*, M., 11 Jac. 1, which was thus: The parson of a parish in Bristol libelled in the spiritual court against an inn-keeper, to have tithes of the profits of his kitchen, stable, and wine cellar, and did set forth in his libel, that he made great gain in selling of his beer, having bought it for 500*l.*, and sold it for 1000*l.*, of which gain he ought to have tithe by the common law of the realm. Upon which occasion, the clerk of the papers informed the court, that when one had libelled for tithes of the gain of 10*l.* for 100*l.* put out, a prohibition was granted: and the same was also granted in this case (*r*).

And personal tithes are now scarce any where paid in England, unless for mills (*s*), or fish caught at sea; and then payable where the party hears divine service, and receives the sacraments (*t*).

(*o*) Deg. p. 2, c. 22.

(*p*) Ibid.

(*q*) Ibid.

(*r*) 2 Bulst. 141.

(*s*) [Which are included in the Tithe Commutation Act, *vide ante*.]

(*t*) Wood, b. 2, c. 22.

[Tithes may be payable by custom for houses and other buildings (*u*), although they are generally exempt (*v*). Tithes are not due of things which are of the substance of the earth (*x*), as for lead ore in Derbyshire and tin in Devonshire and Cornwall (*y*). A customary payment in lieu of tithes of mines is good (*z*); a lime kiln, though not tithable of common right, may be so by custom (*a*); so may white salt (*b*).

Tithes of
Houses and
Mines.

[XI. Rateability of Rent-charge.

[6 & 7 Will. 4, c. 71, enacts :

[Sect. 69. "That every rent-charge payable as aforesaid instead of tithes shall be subject to all parliamentary, parochial, and county and other rates, charges and assessments, in like manner as the tithes commuted for such rent-charge have heretofore been subject."

Rent-charge
to be liable to
Rates, &c.

[This clause can bear no other legitimate interpretation than that whatever *was* the *ratio* of the payments made by the incumbent under each of these several denominations, it was unchangeable: it follows, therefore, that every act of the legislature, or judgment of the courts of law, which has affected this proportion, has departed from the principle of the compact between the clergy and laity on which the tithe commutation scheme was based. Nevertheless, such has been the effect of an act (6 & 7 Will. 4, c. 96) passed six days after the Tithe Commutation Act (August 19th, 1836), the design of which was simply to correct the inequality which existed in the pressure of the county rate, in consequence of the variety of methods in which the assessments were made in different parishes; and it was supposed that the rights of the clergy were secured by a proviso inserted in that act. "Provided always, that nothing herein contained shall be construed to alter or affect the principles or different relative liabilities (if any) according to which different kinds of hereditaments are now by law rateable." But the judgment of the Queen's Bench (June 8, 1840), in the case of *The Queen v. The Hon. and Rev. W. Capel, Clerk*, commonly called "*The Watford Case*," decided that this proviso was *inapplicable to tithes*, and in its language so "very inartificial and loose" as to "render the discovery of its definite meaning extremely difficult (*c*)."

Apparent
Meaning of
Clause.

6 & 7 W. 4,
c. 96.

Proviso in
this Act.

(*u*) [*Kinaston v. Piercy*, 2 E. & Y. 289.]

(*v*) [*Vide post*, Tithes in London.]

(*x*) [*Dr. Graunt's case*, 11 Rep. 15; 1 E. & Y. 222; *Witnaer v. Leyfield*, 1 E. & Y. 232.]

(*y*) [*Brown v. Vermuden*, 1 E. & Y. 509; *Tally v. Kelsall*, 1 Wood, 74; *Pindur v. Jackson*, 1 E. & Y. 583.]

(*z*) [*Burton v. Spencer*, 2 Wood, 336.]

(*a*) [*Thomas v. Perry*, 1 Roll. Ab. 642.]

(*b*) [*Burton v. Spencer*, 2 Wood, 336.]

(*c*) [See Sir W. Follett's argument in this case, in Hodges' Report. It is said this proviso was intended to preserve to the tithe owner the benefit

[This decision established that tithes are hereditaments under the Parochial Assessment Act (6 & 7 Will. 4, c. 96), and that a tithe owner is rateable at their net annual value, *i. e.* at such a sum as the tithes might reasonably be expected to let for from year to year, free of the usual tenants' rates and taxes (*b*), and deducting the amount of ecclesiastical dues payable in respect thereof. The effect of 6 & 7 Will. 4, c. 96, therefore is, that while the *incumbent* is rated at the *full* value of his tithes, the occupiers of land in the parish are rated at a different scale. If, for instance, a *tenant* rents land at 300*l.* per annum, and makes a *profit* of 200*l.*, the former sum alone is taken as the rateable value. In the above case, *Rex v. Joddrell* was chiefly relied on to prove that the principle of rating was that the *occupiers* should be rated at their *full* value, while the *rent* or sum at which the land would let is not to be taken as the full value, but as *one criterion only*. *Rex v. Joddrell* was in substance as follows:

What Deductions are to be made in rating a Tithe Commutation Rent Charge.

[By an act of parliament the tithes in a parish were extinguished, and in lieu thereof the rector was entitled to a corn rent. In a rate for the relief of the poor, he was assessed for the full amount of that corn rent, after deducting the amount of parochial dues levied on the rector. The farmers in the parish, who paid the corn rent to the rector, were rated upon the *bonâ fide* amount of the rack rent paid by them to their landlords. It was held, that as the tithe is an outgoing, the corn rent or compensation for tithe was not to be added, as required by the rector, to the amount upon which the farmer is rateable; and in respect of that portion of the annual profit or value, consisting of corn rent, the rector was to be assessed (*c*). Another objection was, that the farmer's share of the profit ought to have been rated, or that the rector should have been rated proportionably less; and this objection prevailed on the ground of inequality, because the farmer was rated, not for the full value of the land which comprised the landlord's and tenant's profit, but for the rack rent, which was the landlord's profit only, while the rector was rated for the full value of his corn rent; for it was said, that the *ratio* which the rent of land bears to its average annual profit or value ought to have been ascertained, and that the rector ought to have been assessed for his tithe rent in the same *ratio*. It was held, that in estimating the amount at which the rector ought to be rated, the land-tax ought to be deducted from the full amount of his corn-rent, provided the tenants of the other lands in the parish paid the land-tax without being allowed for it by the

of the decision in *The King v. Joddrell*, 1 B. & C. 403. See Letter from the Poor Law Commissioners' Office, Sept. 19, 1837; Remarks on the Old Principle of Assessment to the Poor Rate, &c., by a Bystander; Rev. R. Jones' Letter to Sir R. Peel, on the

Act; Archdeacon Burney's Charge at St. Albans, 1841.—Ed.]

(*b*) [Jurist, vol. iv. p. 886 (1840.)]

(*c*) [By the stat. 6 & 7 Will. 4, c. 96, the tithe commutation rent-charge is to be deducted.]

landlord, but not if such allowance was made. It was also held, that the ecclesiastical dues, including tenths, synodals, &c. ought to be deducted, because they are payable in respect of the rectory, the profits of which constitute the only fund out of which they can be paid; but it was held, that the expenses of providing for the duties of the incumbency, in respect of which the rector claimed a deduction, were not to be allowed, because such duties ought to be performed personally by the rector (*d*).

[In the *Watford* case the court said, “*Rex v. Joddrell* does not convince us that there was any difference in the legal liabilities of the tithe owner and the occupiers of the land (*e*).”

[Shortly after this judgment in the *Watford* case, a temporary act was passed (3 & 4 Vict., c. 89), “to exempt all *Stock in Trade* from the liability of being rated towards the relief of the Poor,” which is calculated to have thrown upon the tithe owner an annual additional impost of half a million. It cannot be doubted that this unintended injustice will soon be remedied by some act of the legislature.

[We have now to consider to what rates and assessments tithes are liable. As to church rates, see that title; as to poor rates, *parson and vicar* being mentioned in 43 Eliz. c. 2, tithes are clearly rateable to the poor; so are persons entitled to the tithe of fish (*f*). All oblations constituting rectorial or vicarial dues, are rateable to the poor (*g*); and even, it should seem, a person’s pension (*h*). Tithes, coal mines, tolls, water-works and saleable underwoods, are assessed according to the net annual amount of profits, deducting all expenses (*i*).

[A vicar is liable to poor rates for his tithe (*h*).

[By sect. 1 of 6 & 7 Will. 4, c. 96, poor rates are to be made upon the net annual value of the hereditaments, free, among other things, from tithe commutation charge. Tithes are liable to land-tax, being expressly enumerated among other *real estates*, by 38 Geo. 3, c. 5, and to highway rates, by sect. 45 of 13 Geo. 3, c. 78; so are rents substituted for tithes under an enclosure act (*l*). The “General Highway Act,” 13 Geo. 3, c. 78, considers as the *occupier* of tithes the person who *receives*, whether it be the owner or his grantee, the tenth part of the produce (*m*).

(*d*) [*Rex v. Joddrell*, 1 B. & Adol. 403.]

(*e*) [Jurist, vol. iv. p. 889.]

(*f*) [*Rex v. Carlyon*, 3 T. R. 385; 2 E. & Y. 359.]

(*g*) [Ibid, per Lord Kenyon.]

(*h*) [2 W. Bl. 1252; 2 E. & Y. 341.]

(*i*) [1 Nol. P. L. 227, 4th ed. As to tithe for which compositions have been made, see *Rex v. Sussex*, 3 Nev. & M. 263; *Rex v. Wilson*, 5 Nev. & M. 119. For the general rule as to

rating property, see *Rex v. Adames*, 4 B. & Ad. 61; 1 Nev. & M. 662.—Ed.]

(*k*) [*Rex v. Turner*, 1 Str. 77; 1 E. & Y. 734.]

(*l*) [See the case of *Rex v. Lacy*, 5 B. & C. 702; 8 D. & R. 457.]

(*m*) [See the case of *Chanter v. Glubb*, 9 B. & C. 479; 4 M. & R. 334: and as to “occupier,” see also *Rex v. Lambeth*, 1 Str. 525; 1 E. & Y. 788.—Ed.]

[In the case of a composition, or modus, the parson is chargeable as *occupier* of the tithe (*n*).

[The common law relieves all ecclesiastical persons from toll, murage, pontage, &c. (*o*). It does not seem a settled point whether or not they are liable to be rated by the commissioners of sewers (*p*).

[Tithes are liable to the payment of first fruits and tenths (*q*). It has been held that, under a clause in a local navigation act, giving compensation for lands, tenements and hereditaments, to be taken as or for damage done thereto, that the tithe owner is not entitled to compensation for the injury done to him by covering titheable land with water, for the purposes of navigation (*r*). A sum of money given, under an inclosure act, to a rector or vicar, in lieu of tithes which were rateable, is equally rateable (*s*). The word "tenements," in a private act of parliament, has been held to include tithes (*t*).

[The act of 6 & 7 Will. 4, c. 71, contains provisions for the recovery of rates on a rent-charge, and for the power of the owner of the rent-charge to appeal against the rates, enacting by its 70th section,

How Rates
and Charges
are to be re-
covered.

["That all rates and charges to which any such rent-charge is liable shall be assessed upon the occupier of the lands out of which such rent-charge shall issue, and in case the same shall not be sooner paid by the owner of the rent-charge for the time being may be recovered from such occupier in like manner as any poor rate assessed on him in respect of such lands; and any occupier holding such lands under any landlord, and who shall have paid any such rate or charge in respect of any such rent-charge, shall be entitled to deduct the amount thereof from the rent next payable by him to his landlord for the time being, and shall be allowed the same in account with his landlord; and any landlord or owner in possession who shall have paid any such rate or charge, or from whose rent the amount of any such rate or charge in respect of any such rent-charge shall have been so deducted, or who shall have allowed the same in account with any tenant paying the same, shall be entitled to deduct the amount thereof from the rent-charge, or

(*n*) [*Rex v. Lambeth*, 1 Str. 525; 11 Mod. 375; 8 Mod. 61; 1 E. & Y. 788.]

(*o*) [2 Inst. 642; see title **Privileges and Restraints of the Clergy**.]

(*p*) [See on this point Callis on Sewers, 131; Com. Dig. Sewers (E 5); *Soady v. Wilson*, 3 Ad. & Ell. 248. Wood thinks they are liable; see his 1 Inst. 176. See 23 Hen 8, c. 5, s. 3; 7 Ann. c. 10, s. 3; 3 & 4 Will. 4, c. 22, ss. 13, 14.—Ed.]

(*q*) [See title **First Fruits and Tenths**, vol. ii.]

(*r*) [*Rex v. N. O. Commissioners*,

4 M. & R. 647; 9 B. & C. 875.]

(*s*) [See the cases of *Lowndes v. Horne*, W. Bl. 1252; 2 E. & Y. 340; *Rex v. Boldero*, 4 B. & C. 467; 6 Dowl. & R. 557; and *Rex v. Wistow*, 5 Ad. & Ell. 250; 6 Nev. & M. 567.]

(*t*) [*Powell v. Bull*, Comyns, 265, 1 E. & Y. 733; *Rex v. Shingle*, 1 Str. 550; 1 E. & Y. 738: but see also the cases of *Chatfield v. Ruston*, 3 B. & C. 863; 5 Dowl. & R. 695; *Rex v. Great Hambleton*, 1 Ad. & Ell. 145, as to the manner in which tithes are affected by inclosure acts.—Ed.]

by all other lawful ways and means to recover the same from the owner of the rent-charge, his executors and administrators; provided that the owner of every such rent-charge shall have and be entitled to the like right of demanding, inspecting, and taking copies of every assessment containing such rate or charge, and of appeal against the same, and the like power of prosecuting such appeal, and the like remedies in respect thereof, as any occupier or rate-payer has or may have in the case of poor rates, although such rate or charge is herein made assessable upon the occupier, and the owner of the rent-charge is not mentioned by name in such assessment."

[The 7 Will. 4 & 1 Vict. c. 69, s. 8, has a further provision on the subject:

["That all rates and charges to which any rent-charge payable in lieu of tithes shall be liable may be assessed upon the owner of the rent-charge, and the whole or any part thereof may be recovered from any one or more of the occupiers of the lands out of which such rent-charge shall issue, in case the same shall not be sooner paid by the owner of the rent-charge upon whom the same shall be assessed, in like manner as any poor rate assessed on such occupier or occupiers in respect of such lands may be recovered, upon giving to such occupier twenty-one days' notice in writing previous to any one of the half-yearly days of payment of the rent-charge, and the collector's receipt for the payment of such rates and charges, or of any part thereof, shall be received in satisfaction of so much of the rent-charge by the owner thereof; but no occupier shall be liable to pay at any one time, in respect of such rates and charges, any greater sum than the rent-charge payable in respect of the lands occupied by him in the same parish shall amount to for the current half-year in which such notice shall have been given." For the Assessment and Recovery of Rates.

[By 17 Geo. 2, c. 3, ss. 2, 3, the churchwardens and overseers of the poor are directed to allow any inhabitant to inspect the poor rates, and to take copies, and a penalty of 20*l.* is imposed for refusing such inspection and copies. In an action for the penalty for not permitting the inspection of a poor rate, the declaration described the plaintiff as an inhabitant of the parish; it was held that this sufficiently showed that he was a party aggrieved. The defendant's duties and liability were sufficiently shown by a description and allegation in the declaration, that the defendant was "assistant overseer," and as such had the rate in his possession. A plea that the plaintiff had no right to inspect the rate, it not being a subsisting rate, or such a rate as the plaintiff was entitled to inspect, was held bad on demurrer, for the act does not require that the party applying should be more than an inhabitant (*p*). The demand of an inspection must be made at a reasonable time and place; therefore where the demand was made at a parishioner's

(*p*) [Batchelor v. Hodges, 4 A. & Bing. 220; Bennett v. Edwards, 7 B. El. 592. See Spenceley v. Robinson, & C. 586; 1 M. & R. 482; 8 B. & C. 3 B. & C. 658; 5 D. & R. 572; 6 702; 6 Bing. 230.]

Assessments
and recovery
of Rates.

own house at eight in the evening, and not at the house of the overseer, no penalty was incurred by his refusal. The overseer is also entitled to a reasonable time for making the copy (*q*). But the demand was held reasonable where it was made upon an overseer on his own premises, not far from his house, and he refused to allow the inspection, but not on the ground that it was inconvenient to go to his house (*r*). By a local act for certain incorporated parishes, guardians of the poor were appointed, and were authorized to appoint a clerk and to make rates; and all poor rates and books purporting to be rates made for the said parishes, and all papers relating to the settlement of the poor were to be delivered to the clerk of the guardians for the time being, who was to receive the same, to be preserved and filed. The clerk to the guardians paid the casual and out-poor weekly, and transacted some other matters relating to the poor, and had the custody of the books; it was held that he was not a person liable to the penalties imposed by 17 Geo. 2, c. 3, s. 3, for not permitting an inhabitant to inspect the rates (*s*).

[By stat. 6 & 7 Will. 4, c. 96, s. 5, it is enacted,

Power to
take Copies
or Extracts
of Rates
gratis.

“That it shall be lawful for any person or persons rated to the relief of the poor of the parish in respect of which any rate shall be made, at all seasonable times, to take copies thereof or extracts therefrom without paying any thing for the same, any thing in any act of parliament to the contrary notwithstanding; and in case the person or persons having the custody of such rate shall refuse to permit or shall not permit such person or persons so rated as afore-said to take copies thereof or extracts therefrom, the person or persons so refusing or not permitting such copy or extract to be made shall forfeit and pay any sum not exceeding five pounds, to be recovered in a summary way before any justice of the peace having jurisdiction in the parish or place.”

Penalty for
Refusal to
permit.

[The 6th section enacts,

Justices act-
ing in Petty
Sessions to
hold Four
Special Ses-
sions in the
Year to hear
Appeals.

“That the justices acting in and for every petty sessions division shall four times at least in every year hold a special sessions for hearing appeals against the rates of the several parishes within their respective divisions, and shall cause public notice of the time and place when and where such special sessions will be holden to be affixed to or near to the door of the parish church of the said parishes, twenty-eight days at the least before the holding of the same; and such special sessions shall and may be adjourned from time to time by the justices there present, as they may think fit; and at such special or adjourned sessions the justices there present shall hear and determine all objections to any such rate on the ground of inequality, unfairness, or incorrectness in the valuation of any hereditaments included therein, which decision shall be binding and conclusive on the parties, unless the person or persons

(*q*) [Spenceley v. Robinson, ubi 594.]
supra.

(*s*) [Whitchurch v. Chapman, 3 B.

(*r*) [Parker v. Edwards, 7 B. & C. & Ad. 691.]

impugning such decision shall within fourteen days after the same shall have been made, cause notice to be given in writing of his, her, or their intention of appealing against such decision, and of the matter or cause of such appeal, to the person or persons in whose favour such decision shall have been made, and within five days after giving such notice shall enter into a recognizance before some justice of the peace, with sufficient securities, conditioned to try such appeal at the then next general sessions or quarter sessions of the peace which shall first happen, and to abide the order of and pay such costs as shall be awarded by the justices at such quarter sessions, or any adjournment thereof; and such justices, upon hearing and finally determining such matter of appeal, shall and may, according to their discretion, award such costs to the party or parties appealing or appealed against as they shall think proper, and their determination in or concerning the premises shall be conclusive and binding on all parties, to all intents and purposes whatsoever: Provided always, that no such objection shall be inquired into by the said justices in special session unless notice of such objection in writing under the hand of the complainant shall have been given, seven days at least before the day appointed for such special session, to the collector, overseers, or other persons by whom such rate was made: Provided also, that the said justices in special session shall not be authorized to inquire into the liability of any hereditaments to be rated, but only into the true value thereof and into the fairness of the amount at which the same shall have been rated."

Seven Days
Notice to be
given of Ob-
jections.

Proviso.

[The 7th section enacts,

["That the justices present at any such special or adjourned session shall for the aforesaid purpose have all the powers of amending or quashing any such rate so objected to of any parish or other district within their division, and likewise of awarding costs to be paid by or to any of the parties, and of recovering such costs, which any court of quarter sessions of the peace has upon appeals from any such rate, except as herein excepted: Provided always, that no order of the said justices shall be removed by certiorari or otherwise into any of his majesty's courts of record at Westminster: Provided also, that nothing in this act contained shall be construed to deprive any person or persons of the right to appeal against any rate to any court of general or quarter sessions: Provided also, that no order of the said justices in special session shall be of any force pending any appeal touching the same subject matter to the court of general or quarter sessions of the peace having jurisdiction to try such appeal, or in opposition to the order of any such court upon such appeal."]

Justices may
act with all
the Powers
of Justices in
Quarter Ses-
sions.

[XII. *Other Incidents to Rent-charge and Tithes.*

[One of the principal incidents of the rent-charge is the power given to "any person or persons who shall either alone or together be seised of or have the power of acquiring or disposing of the fee-simple in possession of any tithes or rent-

charge in lieu of tithes (*t*).” Of merging such tithes or rent-charges in land, see this subject treated of *post*.

Tithes in lay
Lands.

[Tithes which come to the crown by the statutes of dissolution, and are now vested in the lay impropriators, are subject to all the laws and incidents of other freehold property; they are assets for the payment of debts, and subject to dower and curtesy (*u*); and having become lay fees, they are tenements within the Statute *De Donis*, 13 Edw. 1, c. 1 (*v*), and may be entailed and limited to the heirs of the body (*x*). The statute 3 & 4 Will. 4, c. 74 (*y*), for the abolition of fines and recoveries, extends to tithes (*z*). Tithes are *not* subject to *customary* modes of descent as to gavelkind or borough English (*a*). Tithes of which a man is seised in fee may be devised as hereditaments (*b*); and it seems may pass by a devise of all lands in a parish, if the testator has no land there, in order to make the devise operative (*c*). The act 7 Will. 4 and 1 Vict. c. 26, for the amendment of the laws with respect to wills, includes tithes. Formerly no time was a bar to the recovery of tithes; but by 2 & 3 Will. 4, c. 100, and 3 & 4 Will. 4, c. 27, the time was limited. By section 2 of the latter statute it was enacted,

Time as bar
to recovery.

No Land or
Rent to be
recovered but
within 20
Years after
the Right of
Action ac-
crued.

[“That after the thirty-first day of December, one thousand eight hundred and thirty-three, no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same.

Crown,

[The crown, it should be observed, is not particularly named in this statute, as it must be to deprive it of any prerogative right.

[It is carefully provided that the rent-charge shall be sub-

(*t*) [1 & 2 Vict. c. 64, s. 1.]

(*u*) [*Hulme v. Pardoe*, M'Clel. 393; 3 E. & Y. 116.]

(*v*) [Co. Litt. 159 a.]

(*x*) 1 Vent. 173; 2 Lev. 139; Co. Litt. 6; Cro. Jac. 301; *Rex v. Ellis*, 3 Price, 323; 3 E. & Y. 781.]

(*y*) [By 33 Hen. 8, c. 7, s. 7, recoveries and fines of tithes and other ecclesiastical possessions which were in *lay* hands, might be suffered and levied in the same manner as if lands; but tithes must have been named, in order to pass them in such assurances.—Ed.]

(*z*) [*Gibson v. Clarke*, 1 Jac. & W. 159; 3 E. & Y. 946.]

(*a*) [*Doe d. Lushington v. Llandaff*, 2 New Rep. 491; 2 E. & Y. 557.]

(*b*) [*Swinb.* 140; *Ritch v. Sanders*, Styles, 261.]

(*c*) [*Ashton v. Ashton*, 1 P. Wms. 386. See also *Hobson v. Blackburne*, 1 Mylne & Keen, 570. It has not been decided whether tithes would pass under a devise of a messuage and tenement “and all the profits arising therefrom, at D. in the parish of B.” *Doe d. Watson v. Jefferson*, 2 Moore, 260; 2 Bing. 118.]

ject to the same incumbrances and incidents as before the tithe commutation acts.

[Sect. 71. " That any person having any interest in or claim to any tithes, or to any charge or incumbrance upon any tithes, before the passing of this act, shall have the same right to claim upon the rent-charge for which the same shall be commuted as he had to or upon the tithes, and shall be entitled to have the like remedies for recovering the same as if his right or claim to or upon the rent-charge had accrued after the commutation : provided that nothing herein contained shall give validity to any mortgage or other incumbrance which before the passing of this act was invalid or could not be enforced ; and every estate for life, or other greater estate, in any such rent-charge, shall be taken to be an estate of freehold ; and every estate in any such rent-charge shall be subject to the same liabilities and incidents as the like estate in the tithes commuted for such rent-charge ; and where any lands were exempted from tithe whilst in the occupation of the owner thereof by reason of being glebe or of having been heretofore parcel of the possessions of any privileged order, the same lands shall be in like manner exempted from the payment of the rent-charge apportioned on them whilst in the occupation of the owner thereof ; and where by virtue of any act or acts of parliament heretofore passed any tithes are authorized to be sold, exchanged, appropriated, or applied in any way, the rent-charges for which such tithes may be commuted under the provisions of this act, or any part thereof, shall or may be saleable or exchangeable, appropriated and applied, to all intents and purposes, in like manner as such tithes, and the same powers of sale, exchange, and appropriation shall in all such cases extend to and may be exercised in respect of the said commutation rent-charges ; and the money to arise by the sale of such rent-charges shall or may be invested, appropriated, and applied to the same purposes and in like manner as the money to arise by the sale of any such tithes might have been invested, appropriated, and applied under such particular act or acts in case this act had not been passed ; and no such rent-charge shall merge or be extinguished in any estate of which the person for the time being entitled to such rent-charge may be seised or possessed in the lands on which the same shall be charged : Provided always, that it shall be lawful for any person seised in possession of an estate in fee simple or fee tail of any tithes or rent-charge in lieu of tithes, by any deed or declaration under his hand and seal, to be made in such form as the said commissioners shall approve, and to be confirmed under their seal, to release, assign, or otherwise dispose of the same, so that the same may be absolutely merged and extinguished in the freehold and inheritance of the lands on which the same shall have been charged."

6 & 7 Will.
4, c. 71.

Rent-charge
to be subject
to the same
Incum-
brances and
Incidents as
Tithe before
this Act.

Proviso.

[As to charges on benefices, see title **Benefice**, vol. i. p. 184 a. The charges and incumbrances on tithes, being various and many, such as liability to the repairs of the chancel (see title **Church**), to stipends of ministers and curates, and fee-farm rents, and sometimes to mortgages, annuities, &c., the commissioners for carrying the tithe commu-

2 & 3 Vict.
c. 62.

On Merger
of Tithes or
Rent-charge,
the Charges
thereon to be
Charges on
Lands.

tation acts into execution, refused to confirm the merger of tithes so incumbered into land, till the passing of the 2 & 3 Vict. c. 62, which removed this obstacle by making any legal charge on the tithes the first charge on the land in which the tithes are merged, and by giving the same remedies against such lands, or the owners thereof, as existed previously to the merger against the tithes or the owners thereof. The 1st section of this act, after reciting the former statutes, enacts,

[“ That in every case where any tithes or rent-charge shall have been or shall hereafter be released, assigned, or otherwise conveyed or disposed of under the provisions of the said acts, or any of them, or of this act, for merging or extinguishing the same, the lands in which such merger or extinguishment shall take effect shall be subject to any charge, incumbrance, or liability which lawfully existed on such tithes or rent-charge previous to such merger to the extent of the value of such tithes or rent-charge; and any such charge, incumbrance, or liability shall have priority over any charge or incumbrance existing on such lands at the time of such merger taking effect; and such lands, and the owners thereof for the time being, shall be liable to the same remedies for the recovery of any payment and the performance of any duty in respect of such charge, incumbrance, or liability, or of any penalty or damages for nonpayment or non-performance thereof respectively, as the said tithes or rent-charge, or the owner thereof for the time being, were or was liable to previous to such merger.”]

[It gives also a power of apportioning the charges on tithes merged :

Power for
Special Ap-
portionment
of such
Charge on
Lands being
of Three
Times the
Value of the
Charge.

[Sect. 2. “ That every person entitled to exercise the powers for merger of tithes or rent-charge in land under the said acts or any of them, or of this act, may, with the consent of the tithe commissioners for the time being under their hands and seal of office, and of the person to whom the lands in which such merger or extinguishment shall take effect shall belong, either by the deed or other instrument or declaration by which such merger shall be effected, or by any separate deed, instrument, or declaration to be made in such form as the commissioners shall approve, specially apportion the whole or any part of any such charge, incumbrance, or liability affecting the said tithes or rent-charge so merged or extinguished, or proposed to be merged or extinguished in such lands, upon the same or any part thereof, or upon any other lands of such person held under the same title and for the same estate in the same parish, or upon the several closes or portions of such lands, or according to an acreable rate or rates upon lands of different quality, in such manner and proportion, and to the exclusion of such of them, as the person intending to merge the same, with such consent as aforesaid, may by any such deed, instrument, or declaration direct: provided always, that no land shall be so exclusively charged unless the value thereof shall in the opinion of the said commissioners be at least three times the value of the amount of the charge, incumbrance, or liability charged or intended to be charged thereon, over and above all other charges and incumbrances, if any, affecting the same.”]

[And of apportioning charges on tithes not merged :

2 & 3 Vict.
c. 62.

[Sect. 4. " That where the whole of the great tithes or the whole of the small tithes, or the respective rent-charges in lieu thereof, shall be lawfully subject to any such charge, incumbrance, or liability, and the person entitled to such tithes or rent-charge respectively shall be desirous of apportioning such charge, incumbrance, or liability respectively exclusively upon any part of such tithes or rent-charge, although such person has not the power or does not intend to merge the same under the said acts or this act, such person may, with the like consent of the said commissioners, and in such manner as they shall see fit and prescribe, and also with the consent of the bishop of the diocese, specially apportion such charge, incumbrance, or liability respectively upon any part or portion of the tithes or rent-charge respectively subject thereto, not being in the opinion of the said commissioners less than three times the value of the said charge, incumbrance, or liability, or of such part thereof as shall be so apportioned thereon, or intended so to be."

Power of
Special Ap-
portionment
on Tithes or
Rent-charge.

[Among other incidents to the rent-charge should be mentioned the provisions for its apportionment, where by a vacancy it has become due to two persons :

[Sect. 86. " That the several provisions of an act passed in the fourth and fifth years of his present majesty, intituled, ' An Act to amend an Act of the Eleventh Year of King George the Second, respecting the Apportionment of Rents, Annuities, and other periodical Payments,' shall extend to all rent-charges payable under this act."

Powers of
4 & 5 Will. 4,
c. 22, to ex-
tend to Rent-
Charges
under this
Act.

[See this statute under title *Leases*, and see the title *Vacation*, for the law on this subject. It may be as well to mention here, that it had been held, that where a lease for years of tithes was made by a rector, under a rent payable annually, ceasing on his death, and the succeeding incumbent had received from the lessee a sum of money as the rent due for the whole year in the course of which the lessee died, that apportionment should be decreed in favour of his executor. On the principle, that although the representatives could not have recovered any part from the lessee, or the persons entering into the compositions, that it was against conscience, where the rent and compositions were actually paid, that the successor should retain the whole (*d*).

[Under the Tithe-Commutation Act, the rent-charge will be apportioned between the parties with reference to the respective periods of their holding the benefice. On the death, resignation, or deprivation of an incumbent, the successor will be entitled to receive the whole half-yearly payment accruing due after his induction, but he must account to the predecessor or his representative for so much of such half-yearly payment as became due during the predecessor's incumbency.

(*d*) [*Hawkins v. Kelly*, 8 Ves. 308 ; *Aynsley v. Wordsworth*, 2 Ves. & B. 331.]

[It will be seen below, that uncultivated land may, under certain circumstances, be distrained for rent-charge.

[XIII. *Tithes and Rent-charge exchanged for or merged in Land.*

6 & 7 Will.
4, c. 71. [The 6 & 7 Will. 4, c. 71, contains certain provisions for giving land, in lieu of tithes, to *ecclesiastical* persons, but not to *lay* impropriators. It should be observed, this exchange of land for tithes must be the subject of an *agreement*: it cannot be an *award* (e) of the commissioners.

[Sections 26, 27, and 28, having specified the nature of the agreement to be made, it is enacted, by s. 29,

Land not exceeding twenty acres, may be given as commutation for tithes, &c.

["That any such parochial agreement may be made in manner and form aforesaid for giving to any ecclesiastical owner, in right of any spiritual benefice or dignity, of any tithes or of any rent-charge for which such tithes shall have been commuted, any quantity not exceeding in the whole twenty imperial acres of land by way of commutation for the whole or an equivalent part of the great or small tithes of the parish, or in discharge of or exchange for the whole or an equivalent part of any rent-charge agreed to be paid instead of such tithes, but subject in every case to the provisions hereinafter contained; and every such agreement shall be made in such form and contain such particulars as the commissioners shall in that behalf direct, specifying the land whereof the tithes or rent-charge for which such tithes shall have been commuted shall be the subject of such agreement, and giving full and sufficient descriptions of the quantity, state of culture, and annual value of the land proposed to be given in exchange for such tithes or rent-charge: provided always, that the same consent and confirmation shall be necessary to any such agreement as in the case of an agreement for a rent-charge; and that in case the said agreement shall not extend to the whole of the tithes of the parish, an agreement or award as hereinafter provided may and shall be made for the payment of a rent-charge in satisfaction of the residue of the said tithes; and such rent-charge, when agreed upon or awarded, or the residue thereof, shall be apportioned in manner hereinafter provided upon all the lands of the parish subject to the payment of tithes, unless otherwise agreed upon by the parties to the said parochial agreement, except the land so given by way of commutation, in like manner as if no agreement for giving land had been made: provided also, that the land so given shall be free from incumbrances, except leases at improved rent, land-tax, or other usual out-goings, and shall not be of leasehold tenure, nor of copyhold or customary tenure, subject to arbitrary fine or the render of heriots."

[Under these provisions it will be seen, that land in lieu of tithes could not be given after the confirmation of the appointment. The 2 & 3 Vict. c. 62, made (as will be seen) the time for giving land in lieu of tithes co-extensive with the tithe com-

(e) [See 6 & 7 Will. 4, c. 71, s. 50.]

mission. The 6 & 7 Will. 4, c. 71, further provided that such lands should be subject to the same uses and trusts as the tithes, and that the agreements for the exchange should operate as conveyances :

[Sect. 31. "That such agreement for giving land confirmed by the said commissioners, shall operate as a conveyance of such land to the owner of such tithes or rent-charge, and the land so conveyed shall thereupon vest in and be and be deemed to be holden by such person or persons, and upon the like uses and trusts in every respect as the tithes or rent-charge in commutation or exchange for which the same shall have been given shall be vested and holden : and for the purpose of making and completing any such agreement, the provisions of this act respecting persons under legal disability (*f*) shall apply to every person party to such agreement, or in whom any such land shall be vested, and whose concurrence or consent may be necessary to the perfecting thereof, or of the title to such land, as fully as if the same had been here repeated and re-enacted."

Agreements for giving land to operate as conveyances.

[Power is also given, by this statute, to the land-owner, to give twenty acres of land in lieu of rent-charge :—

["It shall be lawful for the owner of any lands chargeable with any such rent-charge to agree, at any time before the confirmation of any such instrument of apportionment, with any ecclesiastical person being the owner of the tithes thereof in right of any spiritual benefice or dignity, for giving land instead of the rent-charge charged or about to be charged upon his lands ; and every such agreement shall be made under the hands and seals of the land-owner and tithe-owner, and shall contain all the particulars hereinbefore required to be inserted in a parochial agreement for giving land instead of tithes or rent-charge : provided always, that no such tithe-owner shall be enabled to take or hold more than twenty imperial acres of land in the whole by virtue of any such agreement or agreements made in the same parish ; and the same consent and confirmation relatively to the lands and tithes comprised in the said agreement shall be necessary to any such agreement as in the case of a parochial agreement for giving land instead of tithes ; and all the provisions hereinbefore contained concerning a parochial agreement for giving land shall be applicable to every such agreement as hereinbefore last mentioned, so far as concerns the lands and tithes comprised in the said agreement : provided also, that any amendment which shall be made in the draft of apportionment before confirmation thereof, and subsequent to any such agreement for giving

Owners of lands chargeable with rent-charge may give land instead thereof.

(*f*) [By 6 & 7 W. 4, c. 71, s. 15, "when-ever the patron of any benefice or the owner of any lands or tithes to which the provisions of this act are intended to apply, or any person interested in any question as to any tithes, shall be a minor, idiot, lunatic, feme covert, beyond the seas, or under any other legal disability, the guardian, trustee, committee of the estate, husband, or attorney respectively, or, in default

thereof, such person as may be nominated for that purpose by the commissioners after due inquiry shall have been made by them as to the fitness of such person, and whom they are hereby empowered to nominate under their hands and seal, shall, for the purposes of this act, be substituted in the place of such patron, owner, or person so interested."]

land instead of rent-charge, whereby the charge upon the lands referred to in such agreement shall be altered, shall be taken to annul the execution of such agreement for giving land, and any consent which may have been necessary thereunto."

Who may
merge Rent-
charge.

[By s. 6 & 7 Will. 4, c. 71, only tenants in fee or in tail were empowered to merge rent-charge; but this power was extended by 1 & 2 Vict. c. 64, and 2 & 3 Vict. c. 62, to all persons having powers of appointment over the fee simple of tithes or rent-charge, and to cases where tithes (or rent-charge in lieu of tithes), and the lands out of which they are payable, *are both settled to the same uses*, when anybody in *possession of an estate for life in tithes*, may merge (*g*): and also to the owners of glebes in certain cases specified below, in s. 6 of 2 & 3 Vict. c. 62.

1 & 2 Vict.
c. 64.

[The 1 & 2 Vict. c. 64, enacts, that whereas, by the 6 & 7 Will. 4, c. 71, s. 71 (*h*), it was provided,

Persons hav-
ing the power
of appoint-
ment over
tithes may
merge them
in the land.

["That it should be lawful for any person seised in possession of an estate in fee simple or fee tail of any tithes, or rent-charge in lieu of tithes, by any deed or declaration under his hand and seal, to be made in such form as the Tithe Commissioners for England and Wales should approve, and to be confirmed under their seal, to release, assign, or otherwise dispose of the same so that the same might be absolutely merged and extinguished in the freehold and inheritance of the lands on which the same should have been charged. And whereas it is expedient that the aforesaid provision should be extended in manner hereinafter mentioned: be it therefore enacted, that from and after the passing of this act it shall be lawful for any person or persons who shall, either alone or together, be seised of or have the power of acquiring or disposing of the fee simple in possession of any tithes, or rent charge in lieu of tithes, by any deed or declaration under his or their hand and seal or hands and seals, to be made in such form as the Tithe Commissioners for England and Wales shall approve, and to be confirmed under their seal, to convey, appoint, or otherwise dispose of the same, so that the same may be absolutely merged and extinguished in the freehold and inheritance of the lands out of or on which the same shall have been issuing or charged; and every such deed or declaration as aforesaid shall be valid and effectual for the purpose aforesaid, although the same may not be executed or made in the manner or with the formalities or requisites which if this act had not been passed would have been essential to the validity of any instrument by which such person or persons could have acquired or disposed of the fee simple in possession of such tithes, or rent-charge in lieu of tithes (*i*)."]

Where tithes
and the lands
charged
therewith

[Sect. 3. "That in all cases where tithes, or rent-charge in lieu of tithes, and the lands out of which the same are payable, are both settled to the same uses, it shall be lawful for any person in

(*g*) [*Vide supra*, s. xi. of this chapter.]

(*h*) [See s. xi. of this chapter.]

(*i*) [Sect. 2. "That no deed or de-

claration authorised by this act for the merging of tithes shall be chargeable with any stamp-duty."]

possession of an estate for life in both such lands and tithes, or rent-charge in lieu of tithes, by any deed or declaration under his hand and seal, to be made in such form as the said commissioners shall approve, and to be confirmed under their seal, to release, assign, or otherwise dispose of such tithes or rent-charge, so that the same may be absolutely merged and extinguished in the freehold and inheritance of the lands out of which such tithes shall have been issuing, or on which such rent-charge shall have been charged."

1 & 2 Vict.
c. 64.

are settled to same uses, the tenant for life may cause them to merge in the land.

["Sect. 4. And whereas doubts have been entertained whether, according to the true construction of the said act, any tithes, or rent-charge in lieu of tithe, can be merged in lands of copyhold tenure, and it is expedient that such doubts should be removed; be it therefore declared and enacted, that the provisions in the said act and this act contained as to the merger of any tithe, or rent-charge in lieu of tithe, shall be deemed and taken to extend to all lands, being copyhold of inheritance or copyhold for lives, or of any other tenure whatsoever (k)."]

Tithes may be merged in copyhold lands.

[A further provision on the subject is made by 2 & 3 Vict. c. 62, as to the valuation of tithes merged in copyhold land; sect. 7 enacts—

2 & 3 Vict.
c. 62.

["That in every case of merger of tithes or rent-charge issuing out of land of copyhold tenure, and subject to arbitrary fine, it shall be lawful for the said commissioners, on the application of the owner of such land, to ascertain, by such ways and means as they shall think fit, the annual value of the tithes or rent-charge so merged or intended to be merged; and the said commissioners shall in such case cause to be indorsed on the deed, declaration, or other instrument effecting such merger, a certificate under their hands and seal, setting forth such annual value so ascertained; and in every case of future assessment of fine on the lands which before such merger were subject to such tithes or rent-charge, the parties entitled to such fine shall assess the same as if such lands were subject to the tithes or rent-charge of which the annual value shall be so endorsed; and the production of such deed, declaration, or instrument of merger, or of a duplicate thereof, with such certificate endorsed, or of an office copy of such deed, declaration, or instrument and certificate endorsed thereon, shall be sufficient evidence of the annual value of such tithes or rent-charge."]

Provision for deducting value of tithes and rent-charge from arbitrary fines in cases of merger in copyholds, 1 & 2 Vict. c. 64, s. 4.

[This act also allows the tithes and rent-charge of glebe lands to be merged:—

[Sect. 6 enacts, "that the provisions of the said acts and this act for merger or extinguishment of tithes or rent-charge instead of tithes in the lands out of which such tithes shall have been issuing, or whereon such rent-charge shall be fixed, do and shall extend to glebe or other land, in all cases where the same and the tithes or rent-charge thereof shall belong to the same person in virtue of his benefice, or of any dignity, office, or appointment held by him,

Tithe and rent-charge of glebe may be merged.

(k) Sect. 5. "That in the construction and for the purposes of this act the several words "person," "lands," and "tithes," shall respectively mean and include whomsoever and what-

soever the same words would have meant and included if the enactment hereinbefore made had been contained in the said recited act instead of this act."]

* 2 & 3 Vict.
c. 62.

Extension of
6 & 7 Will. 4,
c. 71, ss. 29, 62,
for giving
land in lieu
of tithes.

Lands taken
by ecclesiastical
tithe-owners in-
stead of tithes
to vest abso-
lutely in
them.

Corporations,
trustees, and
feoffees to
charitable
uses, may
convey lands.

[This act extends the provisions contained in ss. 29, 62, of 6 & 7 Will. 4, c. 71, mentioned above, as follows :

[“ Sect. 19. That so much of the said first-recited act as enables any land-owner, either by parochial agreement or individually, to give land instead of tithes or rent-charge at any time before the confirmation of any instrument of apportionment, shall be and the same is hereby extended, and the powers and provisions for that purpose may be exercised in every such case at any time, as well after as before such confirmation of the apportionment as aforesaid, during the continuance of the commission constituted and with the consent of the commissioners appointed and acting under the said first-recited act.

[“ Sect. 20. That in any case where any land shall have been or shall hereafter be taken by any ecclesiastical tithe-owner under any agreement for the commutation of any tithes, or for giving land instead of any rent-charge, under the recited acts, or any of them. or this act, such land shall, upon the confirmation of such agreement, vest absolutely in such tithe-owner and his successors, free from all claims of any person or body corporate, and without being thereafter subject to any question as to any right, title, or claim thereto, or in any manner affecting the same ; and the commissioners shall cause to be inserted in or endorsed upon every such agreement the amount of the rent-charge instead of which such land was given, and the lands upon which the same was chargeable ; and every person who, if this act had not been made, would have been entitled to recover any such land given instead of rent-charge, or any rents or profits issuing out of such land, shall be entitled to recover against the party or parties giving such land instead of tithes or rent-charge, his, her, or their heirs, executors, or administrators, by way of damages, in an action on the case, such compensation as he or she may be entitled to for any loss thereby sustained ; and such damages, and all costs and expenses awarded to the plaintiff in such action shall forthwith attach upon and be payable out of the lands exonerated by such agreement.

[“ Sect. 21. That all agreements and other assurances which shall be made for the purpose of effecting the taking of land instead of rent-charge under the provisions of the said recited acts, or any of them, or this act, shall be valid and effectual for the purpose of vesting an estate of inheritance as to such lands in such ecclesiastical tithe-owner and his successors, notwithstanding the same be made by any corporation sole or aggregate, or any trustees or feoffees for charitable purposes, otherwise restrained from or incapable of making any such valid conveyance or assurance.”

[XIV. *Mode of Recovering Rent-Charge.*

6 & 7 Will.
4, c. 71.

When Rent-
charge is in
arrear for 21
days after
half-yearly
days of pay-

[The powers given for the recovery of the rent-charge by 6 & 7 W. 4, c. 71, are as follows.

[Sect. 81. “ That in case the said rent-charge shall at any time be in arrear and unpaid for the space of twenty-one days next after any half-yearly day of payment, it shall be lawful for the person entitled to the same, after having given or left ten days’ notice in

writing at the usual or last known residence of the tenant in possession, to distrain upon the lands liable to the payment thereof, or on any part thereof, for all arrears of the said rent-charge, and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto, as any landlord may for arrears of rent reserved on a common lease for years; provided that not more than two years' arrears shall at any time be recoverable by distress."

6 & 7 Will. 4,
c. 71.

ment, the
person enti-
tled thereto
may distrain.

"It is probable that some nice questions as to priority of right to the goods distrained, and the extent of the power of distress, will arise under this section (*l*). By the stat. 8 Ann. c. 14, s. 1, the landlord is entitled to be paid one year's rent actually due at the time of the execution, before the goods are applied to the purposes of the execution. By 6 Geo. 4, c. 16, s. 74, no distress for rent levied after an act of bankruptcy, whether before or after the fiat, will be available for more than one year's rent, accrued prior to the date of the fiat, but the landlord may come in as a creditor for the residue. Under a sequestration from equity, the landlord is entitled to be paid arrears of rent (*m*). Perhaps it is not clear that the owner of the rent-charge will be entitled to avail himself of the above statutes; at any rate, it should seem that he can only do so for one year's arrears.

Priority of
right to Goods
distrained.

"At common law, distresses taken for rent in arrear were not saleable, but could only be kept as a pledge for the rent. By the stat. 2 Will. and Mary, c. 5, goods and chattels distrained for rent due under a contract, may be kept and sold in the manner pointed out by that act. It was not until the 11 Geo. 2, c. 19, s. 8, that landlords had power to distrain corn, grain, or other produce growing on the land demised. The grantee of a rent-charge was empowered by deed 'to detain, manage, sell, and dispose of distresses in the same manner in all respects as distresses for rents reserved upon leases for years, and as if the annuity was a rent reserved upon a lease for years;' and it was held that these words were fully satisfied by holding them to grant the powers which were given to landlords under the stat. 2 W. & M. c. 5, without extending them to the new subjects of distress first granted by the statute 11 Geo. 2, c. 19. The court held that such a power ought to be construed strictly, especially in a case seeking to bring within it the growing crops of a person who was a stranger to the deed (*n*).

Distresses
at Common
Law.

"The following case may probably have some application to cases which may arise under the new act. An inclosure act provided 'that there shall be issuing and payable from time to

(*l*) [The following remarks are taken from a valuable note to clause 81, in Mr. Shelford's elaborate work on the Tithe Commutation Acts, p. 267.—Ed.]

(*m*) [*Dixon v. Smith*, 1 Swanst. 457.]

(*n*) [*Miller v. Green*, 8 Bing. 107; 2 Cr. & J. 142; 1 Moore & S. 199; 2 Tyrw. 1.

Distress for
Corn-rents on
recently en-
closed Land.

time to the impropriators and the vicar, according to their rights and interests therein, and of the several estates of the land owners, in the parish, such yearly corn rents or sums as therein mentioned, and declared that the rent should be payable by the persons who should be in possession or occupation of the lands or estates out of which the same should be issuing; it then specified the time and place of payment, and enacted 'that the several corn rents and sums of money should be in lieu of and in satisfaction for all tithes.' By a subsequent clause, the impropriators were to have the same powers and remedies for recovering the yearly *rent*, when the same was in arrear, as were by law given for the recovery of rent service, or other rent in arrear. Part of the inclosed lands was uncultivated and untenanted for some years, during which time the owner lived on another estate; he afterwards demised them to a tenant who entered and occupied. A distress was taken for the corn rents, and payment was refused, on the ground that during the period when the rents respectively became due, the land was not liable to the payment of corn rents, because no crop was reared upon it, and the owner had not any beneficial enjoyment of it. It was said by Bayley, J.: 'The parties may be considered in the same situation as if the tithe owner had granted a lease of the tithes at an annual rent. In that case it is quite clear that it would be no answer to an action for the rent, that no tithe in kind was produced, or that the land was unoccupied. Here the rent is a substitute for tithes, not merely *de anno in annum*, but for ever. It does not therefore follow that because no tithe in kind was produced, that no money rent is payable. It is said that this may operate as a hardship in particular cases where preceding tenants have omitted to pay the rent: perhaps the tithe owner might not have any remedy by distress against an occupier not coming in under the party indebted; here, however, the plaintiff in replevin came in under the landlord during whose occupation the arrears of rent accrued. During that time the landlord had the legal occupation, for he might have maintained trespass or ejectment against a wrong-doer. I think, therefore, that even if the rent were payable only by a person in possession, that, under the circumstances of the case, he must be considered to have been in possession during the time that there was no tenant. But my opinion proceeds principally on the ground, that by the act of parliament the corn-rent is made a perpetual charge or burden on the estate.' And it was held that the distress was legal (o)."

When Rent-
charges are in
arrear for 40
days after

[Sect. 82. "That in case the said rent-charge shall be in arrear and unpaid for the space of forty days next after any half-yearly day of payment, and there shall be no sufficient distress on the

(o) [*Newling v. Pearse*, 1 B. & C. 437; 2 Dowl. & R. 607; 3 E. & Y. 1094; Gw. 2067.]

premises liable to the payment thereof, it shall be lawful for any judge of his majesty's courts of record at Westminster, upon affidavit of the facts, to order a writ to be issued, directed to the sheriff of the county in which the lands chargeable with the rent-charge are situated, requiring the said sheriff to summon a jury to assess the arrears of rent-charge remaining unpaid, and to return the inquisition thereupon taken to some one of his majesty's courts of law at Westminster, on a day therein to be named, either in term time or vacation: a copy of which writ, and notice of the time and place of executing the same, shall be given to the owner of the land, or left at his last known place of abode, or with his known agent, ten days previous to the execution thereof, and the sheriff is hereby required to execute such writ according to the exigency thereof; and the costs of such inquisition shall be taxed by the proper officer of the court: and thereupon the owner of the rent-charge may sue out a writ of habere facias possessionem, directed to the sheriff, commanding him to cause the owner of the rent-charge to have possession of the lands chargeable therewith until the arrears of rent-charge found to be due, and the said costs, and also the costs of such writ and of executing the same, and of cultivating and keeping possession of the lands, shall be fully satisfied: provided always, that not more than two years' arrears over and above the time of such possession shall be at any time recoverable."

6 & 7 Will. 4,
c 71.

half-yearly
days of pay-
ment, and no
sufficient dis-
tress on the
premises,
writ to be is-
sued, direct-
ing Sheriff to
summon Jury
to assess Ar-
rears.

[It has been held that the injury sustained by a tithe owner in consequence of land being rendered incapable of producing tithe, is not such a wrongful act in law as will entitle a tithe owner to maintain an action for damages (p).

[Sect. 83. "That it shall be lawful for the court out of which such writ shall have issued, or any judge at chambers, to order the owner of the rent-charge who shall be in possession by virtue of such writ from time to time to render an account of the rents and produce of the lands, and of the receipts and payments in respect of the same, and to pay over the surplus (if any) to the person for the time being entitled thereunto, after satisfaction of such arrears of rent-charge and all costs and expences as aforesaid, and thereupon to order a writ of supersedeas to issue to the said writ of habere facias possessionem, and also by rule or order of such court or judge from time to time to give such summary relief to the parties as to the said court or judge shall seem fit."

Account how
to be ren-
dered.

[Sect. 85. "That whenever any rent-charge payable under the provisions of this act shall be in arrear, notwithstanding any apportionment which may have been made of any such rent-charge, every part of the land situate in the parish in which such rent-charge shall so be in arrear, and which shall be occupied by the same person who shall be the occupier of the lands on which such rent-charge so in arrear shall have been charged, whether such land shall be occupied by the person occupying the same as the owner thereof, or as tenant thereof, holding under the same landlord under whom he occupies the land on which such rent-charge so in arrear shall have been charged, shall be liable to be distrained

Powers of
Distress and
Entry to ex-
tend to all
Lands within
the Parish oc-
cupied by the
Owner or un-
der the same
Landlord or
Holding.

(p) [Rex v. Commissioners of New Retfall, 4 M. & R. 647; 9 B. & C. 833.]

6 & 7 Will. 4,
c. 71.

upon or entered upon as aforesaid for the purpose of satisfying any arrears of such rent-charge, whether chargeable on the lands on which such distress is taken or such entry made, or upon any other part of the lands so occupied or holden: provided always, that no land shall be liable to be distrained or entered upon for the purpose of satisfying any such rent-charge charged upon lands which shall have been washed away by the sea, or otherwise destroyed by any natural casualty."

Quakers.

[Quakers' goods, it will be seen, may be distrained off the premises and sold without being impounded.]

Recovery
of Rent-
charges from.

[Sect. 84. "That in all cases in which it shall be necessary to make any distress under this act in respect of any lands in the possession of any person of the persuasion of the people called quakers, the same may be made upon the goods, chattels, or effects of such person, whether on the premises or elsewhere, but nevertheless to the same amount only, and with the same consequences in all respects as if made on the premises; and that in all cases of distress under this act upon persons of that persuasion, the goods, chattels, or effects which may be distrained shall be sold without its being necessary to impound or keep the same: provided always, that no writ under the provision hereinbefore contained shall be issued for assessing or recovering any rent-charge payable under this act in respect of any lands in the possession of any person of the persuasion aforesaid, unless the same shall be in arrear and unpaid for the space of forty days next after any half-yearly day of payment, without the person entitled thereto being able to find goods, chattels, or effects, either on the premises or elsewhere liable to be distrained as aforesaid, sufficient to satisfy the arrears to which such lands are liable, together with the reasonable costs of such distress."

[Where a tenant at rack-rent, at the time when the commutation was effected, has dissented from paying the rent-charge, the landlord is empowered to take the tithes, it being enacted by

If Tenant of
Lands at
Rack-rent
dissent from
paying the
Rent-charge,
the Landlord
may take the
Tithes during
the Tenancy.

[Sect. 79. "That any tenant or occupier who at the time of such commutation shall occupy at rack-rent any lands of which the tithes shall be so commuted may, within one calendar month next after the confirmation of the apportionment by the commissioners, signify, by writing under his hand given to or left at the usual residence of his landlord or his agent, his dissent from being bound to pay any rent-charge apportioned and charged on the said lands as aforesaid; and in that case such landlord shall be entitled, from the time when the said apportionment shall take effect, and during the tenancy or occupation of such tenant or occupier, to stand, as to the perception and collection of tithes or receipt of any composition instead thereof, in the place of the owner of the tithes so commuted, and to have all the powers and remedies for enforcing render and payment of such tithes or composition which the tithe owner would have had if the commutation had not taken place."

[Though it is probable that very few if any cases will fall under this exception, it becomes necessary to preserve in this

chapter so much of the old law on tithes as relates to their “perception and collection,” and to the “powers and remedies” of the tithe owner, in whose place the landlord is by this section to stand.

[XV. *Tithes how to be Recovered.*

1. Incumbent compelled to Demand	737	the Ecclesiastical Court, by the same Statute	749
2. Who to be Sued	ib.	8. Manner of Suing for Tithes in the Ecclesiastical Court	750
3. To whom to be Paid, where the Parish is not known	738	9. Suits for Small Tithes before Justices of the Peace	754
4. Anciently Recoverable in the County Court	ib.	10. Suit for Quakers' Tithes before Justices of the Peace	757
5. Recoverable in the Spiritual Court, by the Canon Law, and by divers Statutes	ib.	11. Tithes severed to be sued for in the Temporal Courts only	762
6. Recovery of Treble Value in the Temporal Courts, by the 2 & 3 Ed. 6	745	12. Suit for Tithes in the Courts of Equity	763
7. Recovery of Double Value in		13. Incumbent Dying	ib.

1. *Incumbent compelled to Demand.*

That tithes may not be lost to the successors, it is enjoined by a constitution of Archbishop Winchelsea that the rectors and vicars of churches, who, respecting the fear or favour of men more than the fear of God, shall not demand their tithes with effect, shall be suspended until they pay half a mark of silver to the archdeacon for their disobedience (*q*).

2. *Who to be Sued.*

The general rule is, that the owner of the nine parts is to be sued for the tenth. But this rule admits of divers exceptions: As,

First, If a parishioner let his ground or herbage, it is said that the parson may sue either the owner of the ground or the owner of the cattle, at his election, for the tithe, if the custom be not against it (*r*).

But in the case of *Fisher v. Lemen*, where cattle were depastured occasionally in another man's ground, it was agreed by the whole court of exchequer that the owner of the land, and not the owner of the cattle, was to pay the tithes. And Baron Page said, that as to what had been said, that the demand might be either against occupier or agister, that could not be; for the same duty could not arise in two different persons at the same time (*s*).

So, if hay be put in ricks on the ground, and after sold, the

(*q*) Lind. 191.
VOL. III.

(*r*) God. 413.

(*s*) Viner, Dismes, L. a.
3 B

buyer cannot be sued for the tithe, but the seller may, in case the tithe thereof was not paid before (*t*).

But if one sells underwood standing, or corn or grass on the ground, the buyer, and not the seller, shall pay the tithe (*u*).

But if any part thereof be cut before the sale, the seller must answer the tithe thereof (*x*).

So where one sells sheep, whereof the parson is to have a rate-tithe, the seller, and not the buyer, must pay the tithe for them (*y*).

So if one that is owner of a coppice of wood, do cut it down and sell it all together, in this case the seller, and not the buyer, must answer for the tithes (*z*).

If cattle or other goods tithable be pawned or pledged, it is said, that he to whom they are pledged must pay tithe of them (*a*).

But if a man deliver cattle or goods to one to be re-delivered to him, he himself, and not the person to whom they are delivered, must pay tithe for them (*b*).

If a parishioner die before he pay his tithes, his executor, if he hath assets, must pay them (*c*).

3. *To whom to be paid where the Parish is not known.*

By the 2 & 3 Edw. 6, c. 13, "Every person who shall have any beasts or other cattle tithable, going feeding or depasturing in any waste or common ground, whereof the parish is not certainly known, shall pay tithes for the increase of the said cattle so going in the said waste or common, to the parson, vicar, proprietor, portionary, owner, or other their farmers or deputies, of the parish, hamlet, town, or other place, where the owner of the said cattle inhabiteth or dwelleth."

4. *Anciently recoverable in the County Court.*

In the Saxon times, tithes were recoverable in the county court, where the bishop or his deputy, and the sheriff, did sit as co-ordinate judges, there being at that time no separate court of ordinary ecclesiastical jurisdiction (*d*).

5. *Recoverable in the Spiritual Court, by the Canon Law, and by divers Statutes.*

By a constitution of Archbishop Winchelsea, "Forasmuch as many are found, who are not willing freely to pay their tithes, we do ordain, that the parishioners be admonished once, twice, and thrice to pay their tithes to God and the

(*t*) God. 412.

(*u*) Boh. 158.

(*x*) Boh. 159.

(*y*) Boh. 158.

(*z*) Boh. 159.

(*a*) Ibid.

(*b*) Boh. 159.

(*c*) Ibid.

(*d*) 2 Inst. 66.

church. And if they do not amend, they shall first be suspended from the entrance to the church, and so at last be compelled to pay their tithes by censures ecclesiastical, if it shall be necessary. And if they shall desire a relaxation or absolution of the said suspension, they shall be remitted to the ordinary of the place to be absolved and punished in due manner (e).

By the statute of *Circumspectè agatis*, 13 Edw. 1, stat. 4, Statute of Circumspectè agatis. "The king to his judges, sendeth greeting: Use yourselves circumspectly in all matters concerning the clergy, not punishing them if they hold plea in Court Christian, in the case where a person doth demand of his parishioners oblation or tithes due and accustomed; in which case, the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."

Due and accustomed.—*Debitas vel consuetas*: By this act, Lord Coke says, *modus decimandi* and real composition are established, (perhaps he had better have said *distinguished*, for both of them were established long enough before this act), for hereby tithes are divided into two parts, viz. tithes *due*, which is the tenth part; and tithes *accustomed*, which is a duty personal due by custom and usage to the parson in satisfaction of tithes, as a yearly sum of money or other duty; and these are here called tithes *accustomed*, and for this *modus decimandi* the parson may sue in Court Christian, and is warranted by this act (f).

By the statute of *Articuli Cleri*, 9 Edw. 2, st. 1, c. 1, Statute of Articuli Cleri. "Whereas laymen do purchase prohibitions generally upon tithes, obventions, oblations, mortuaries; the king doth answer to this article, that in tithes, oblations, obventions, mortuaries, (when they are propounded under these names), the king's prohibition shall hold no place, although for the long withholding of the same, the money may be esteemed at a certain sum. But if a clerk, or a religious man, do sell his tithes being gathered in his barn, or otherwise, to any man for money, if the money be demanded before a spiritual judge, the king's prohibition shall lie; for by the sale, the spiritual goods are made temporal, and the tithes turned into chattels."

By the 18 Edw. 3, stat. 3, c. 7, 18 Edw. 3, st. 3, c. 7. "Whereas writs of *scire facias* have been granted to warn prelates, religious, and other clerks, to answer dismes in our chancery, and to show if they have any thing, or can anything say, wherefore such dismes ought not to be restored to the said demandants, and to answer as well to us as to the party such dismes; such writs from henceforth shall not be granted, and the process hanging upon such writs shall be annulled and repealed, and the parties dismissed from the secular judges of such manner of pleas."

(e) Lindw. 191.

(f) 2 Inst. 490.
3 B 2

18 Ed. 3, st. 3,
c. 7.

Writs of scire facias.]—This is a writ where one hath recovered debts or damages in the king's courts, and sueth not for execution within a year and a day; after which he shall have this writ to warn the party, who, coming not, or saying nothing to stay execution, a writ of *feri facias* goes, commanding the sheriff to levy the debts or damages of his goods (g).

To warn Prelates, Religious, and other Clerks.]—This *scire facias* was not brought against the possessors of the land for subtraction of tithes, but against the prelates or other clerks which took the tithes after they were severed. Commissions out of the Chancery were directed to certain persons, giving them authority to inquire whether such a spiritual person ought to have tithes of such lands, whereupon inquisitions were taken and returned; and if it were found for the spiritual person, upon this record he might have a *scire facias* against any prelate, religious or other clerk that took them after severance (h).

1 Rich. 2,
c. 13.

By the 1 Ric. 2, c. 13, "The prelates and clergy of this realm do greatly complain them, for that the people of holy church, pursuing in the spiritual court for their tithes and their other things, which of right ought and of old times were wont to pertain to the same spiritual court; and that the judges of holy church, having cognizance in such causes, and other persons thereof meddling according to the law, be maliciously and unduly for this cause indicted, imprisoned, and by secular power horribly oppressed, and also enforced with violence by oaths and grievous obligations, and many other means, unduly compelled to desist and cease utterly of the things aforesaid, against the liberties and franchises of holy church: Wherefore it is assented, that all such obligations made or to be made by duress or violence shall be of no value. And as to those that by malice do procure such indictments, and to be the same indictors, after the same indictees be so acquit, such procurers shall suffer a year's imprisonment, and restore to the parties their damages, and shall nevertheless make a grievous fine unto the king. And the justices of assize, or other justices before whom such indictees shall be acquit, shall have power to inquire of such procurers and indictors, and duly to punish them according to their desert."

1 Rich. 2,
c. 14.

By the 1 Ric. 2, c. 14, "At what time that any person of the holy church be drawn in plea in the secular court, for his own tithes taken by the name of goods taken away, and he which is so drawn in plea maketh an exception, or allegeth, that the substance and suit of the business is only upon tithes due of right and of possession to his church or other his benefice; in such case the general averment shall not be taken without showing specially how the same was his lay chattel."

By the 27 Hen. 8, c. 20, s. 1, "When by the noise of the

(g) Terms of the Law.

(h) 2 Inst. 640.

dissolution of monasteries in this parliament, laymen took occasion, upon trifling pretences, to withdraw their tithes, it was enacted as followeth: Forasmuch as divers evil-disposed persons, inhabited in sundry counties, cities, towns and places of this realm, having no respect to their duties to Almighty God, but against right and good conscience having attempted to subtract and withhold in some places the whole, and in some places great part of their tithes and oblations, as well personal as prædial, due unto God and holy church; and, pursuing such their detestable enormities and injuries, have attempted in late time past to disobey and contemn the process, laws and decrees of the ecclesiastical courts of this realm, in more temerarious and large manner than before this time hath been seen; for reformation of which said injuries, and for unity and peace to be preserved amongst the king's subjects of this realm, our sovereign lord the king, being supreme head on earth (under God) of the Church of England, willing the spiritual rights and duties of that church to be preserved, continued and maintained, hath ordained and enacted by authority of this present parliament, that every of his subjects of this realm, according to the ecclesiastical laws and ordinances of his Church of England, and after the laudable uses and customs of the parish or other place where he dwelleth or occupieth, shall yield and pay his tithes and offerings and other duties of holy church; and that for such subtractions of any the said tithes and offerings or other duties, the parson, vicar, curate or other party in that behalf grieved, may, by due process of the king's ecclesiastical laws of the Church of England, convent the person offending, before his ordinary or other competent judge of this realm having authority to hear and determine the right of tithes, as also to compel the same person offending to do and yield his duty in that behalf: and in case the ordinary of the diocese or his commissary, or the archdeacon or his official, or any other competent judge aforesaid, for any contempt, contumacy, disobedience or other misdemeanour of the party defendant, shall make information and request to any of the king's most honourable council, or to the justices of the peace of the shire where such offender dwelleth, to assist and aid the same ordinary, commissary, archdeacon, official or judge, to order or reform any such person in any cause before rehearsed, that then he of the king's said honourable council, or such two justices of the peace (whereof one to be of the quorum), to whom such information or request shall be made, shall have power to attach, or cause to be attached, the person against whom such information or request shall be made, and to commit him to ward, there to remain without bail or mainprize, until he shall have found sufficient surety to be bound by recognizance or otherwise before the king's said counsellor or justice of the peace, or any other like coun-

27 Hen. 8,
c. 20.

sellor or justice of the peace, to the use of our said lord the king, to give due obedience to the process, proceedings, decrees and sentences of the ecclesiastical court of this realm wherein such suit or matter for the premises shall depend or be; and that every of the king's said counsellors, or two justices of the peace, whereof the one to be of the quorum, as is aforesaid, shall have power to take and record such recognizances and obligations."

Sect. 2. "Provided, that this shall not extend to any inhabitant of the city of London, concerning any tithe offering or other ecclesiastical duty, grown and due to be paid within the said city; because there is another order made for the payment of tithes and other duties within the said city."

Sect. 3. "Provided also, that all persons being parties to any such suit, may have their lawful action, demand, or prosecution, appeals, prohibitions, and all other their lawful defences and remedies in every such suit, according to the said ecclesiastical laws, and laws and statutes of this realm, in as ample manner as they might have had if this act had not been made."

Shall have Power to attach.—In the case of *The King v. Sanchee*, H., 9 Will. 3, when several Quakers had been committed upon this statute, it was alleged that the jurisdiction of the spiritual court was taken away by the act of parliament which gives the parson a remedy to recover such tithes by distress, by warrant of a justice of the peace. But by the court, the said act seems only to be an accumulative remedy, and not to repeal the former act of the 27 Hen. 8 (i).

32 Hen. 8,
c. 7.

By the 32 Hen. 8, c. 7, ss. 1, 2, (which was also made upon occasion of the dissolution of monasteries, and which was chiefly intended to enable laymen, that by the dissolution had estates or interests in parsonages, or vicarages impropriate, or otherwise in tithes, to sue for subtraction of tithes in the ecclesiastical courts), it is enacted as followeth: "Whereas divers persons inhabiting in sundry countries and places of this realm, not regarding their duties to Almighty God and to the king our sovereign lord, but in few years past more contemptuously and commonly presuming to offend and infringe the good and wholesome laws of this realm and gracious commandments of our sovereign lord, than in times past hath been seen or known, have not letted to subtract and withdraw the lawful and accustomed tithes of corn, hay, pasturages, and other sort of tithes and oblations, commonly due to the owners, proprietaries, and possessors of the parsonages, vicarages, and other ecclesiastical places within this realm: being the more encouraged thereto, for that divers of the king's subjects, being lay persons, having parsonages, vicarages, and tithes to them, and

(i) Ld. Raym. 323. See also *Rex v. Owen*, 4 Burr. 2095.

their heirs, or to the heirs of their bodies, or for term of life or years, cannot by the order and course of the ecclesiastical laws of this realm sue in any ecclesiastical court for the wrongful withholding and detaining of the said tithes or other duties, nor can by the order of the common laws of this realm have any due remedy against any person, his heirs or assigns, that wrongfully detaineth or withholdeth the same; by occasion whereof much controversy, suit, and variance is like to ensue among the king's subjects, to the great damage and decay of many of them, if convenient and speedy remedy be not provided: It is therefore enacted, that all persons of this realm, of what estate, degree, or condition soever they be, shall fully, truly, and effectually divide, set out, yield or pay, all and singular tithes and offerings aforesaid, according to the lawful customs and usages of parishes and places, whence such tithes or duties shall arise or become due; and if any person, of his ungodly and perverse will, shall detain and withhold any of the said tithes or offerings, or any part thereof, then the person or persons, being ecclesiastical or lay, having cause to demand the said tithes or offerings, being thereby wronged or grieved, shall and may convent the person so offending before the ordinary, his commissary, or other competent minister or lawful judge of the place where such wrong shall be done, according to the ecclesiastical laws; and in every such cause or matter of suit, the same ordinary or other judge, having the parties or their lawful procurators before him, shall proceed to the examination, hearing, and determination of every such cause or matter, ordinarily or summarily, according to the course and process of the said ecclesiastical laws, and thereupon give sentence accordingly."

Sect. 3. "And if any of the parties shall appeal from the sentence, order, and definitive judgment of the said ordinary or other competent judge as aforesaid, then the same judge shall, upon such appellation made, adjudge to the other party the reasonable costs of his suit therein before expended; and shall compel the same party appellant to satisfy and pay the same costs, so adjudged, by compulsory process and censures of the said laws ecclesiastical; taking surety of the other party to whom such costs shall be adjudged and paid, to restore the same costs to the party appellant, if afterwards the principal cause of that suit of appeal shall be adjudged against the same party to whom the same costs shall be yielded: And so every ordinary or other competent judge ecclesiastical shall adjudge costs to the other party, upon every appeal to be made in any suit or cause of subtraction or detention of any tithes or offerings, or in any other suit to be made concerning the duty of such tithes or offerings."

Sect. 4. "And if any person, after such sentence definitive given against him, shall obstinately and wilfully refuse to pay

32 Hen. 8, c. 7.

his tithes or duties, or such sums of money so adjudged, wherein he shall be condemned for the same, it shall be lawful for two justices of the peace for the same shire, whereof one to be of the quorum, upon information, certificate, or complaint to them made in writing by the said ecclesiastical judge that gave the same sentence, to cause the same party so refusing to be attached and committed to the next gaol, and there to remain without bail or mainprize, till he shall have found sufficient sureties to be bound by recognizance or otherwise, before the same justices, to the use of our lord the king, to perform the said definitive sentence and judgment."

Sect. 5. "Provided, that no person shall be sued or otherwise compelled to pay any tithes, for any manors, lands, tenements, or other hereditaments, which by the laws or statutes of this realm are discharged or not chargeable with the payment of any such tithes."

Sect. 6. "Provided also, that this shall not in any wise bind the inhabitants of the city of London, and suburbs of the same, to pay their tithes and offerings within the same city and suburbs, otherwise than they ought to have done before." [See below.]

Sects. 7, 8. "And in all cases where any person shall have any estate of inheritance, freehold, term, right, or interest in any parsonage, vicarage, portion, pension, tithes, oblations, or other ecclesiastical or spiritual profit, which shall be made temporal or admitted to be in temporal hands and lay uses and profits by the laws or statutes of this realm, shall be disseised, deforced, wronged, or otherwise kept or put from their lawful inheritance, estate, seisin, possession, occupation, term, right, or interest therein, by any other person claiming to have interest in or title to the same, the person so disseised, deforced, or wrongfully kept or put out, his heirs, his wife, and such other to whom such injury and wrong shall be done, may have their remedy in the king's temporal courts, or other temporal courts, as the case shall require, for the recovery or obtaining of the same, by writs original of *præcipe quod reddat*, assize of *novel disseisin*, *mort d'ancestor*, *quod ei deforceat*, writs of dower or other writs original, as the case shall require, to be devised and granted in the king's Court of Chancery, in like manner and form as they might have had for lands, tenements, or other hereditaments in such manner to be demanded; and writs of covenant and other writs for fines to be levied, and all other assurances to be had of the same, shall be granted in the the said chancery, according as hath been used for fines to be levied and assurance to be had of lands, tenements, or other hereditaments: Provided, that this shall not give any remedy, cause of action or suit, in the courts temporal, against any person who shall refuse to set out his tithes, or shall withhold or refuse to pay his tithes or offerings; but that in all such cases

the party, being ecclesiastical or lay, having cause to demand or have the said tithes or offerings, and thereby wronged or grieved, shall have his remedy for the same in the spiritual courts, according to the ordinance in the first part of this act mentioned, and not otherwise."

6. *Recovery of treble Value in the temporal Courts by the*
2 & 3 Edw. 6.

By the 2 & 3 Edw. 6, c. 13, s. 1, the aforesaid acts of the 27 Hen. 8, c. 20, and the 32 Hen. 8, c. 7, shall stand in full force: And moreover, it is further enacted as followeth, viz. "All persons shall truly and justly, without fraud or guile, divide, set out, yield, and pay all manner of the prædial tithes, in their proper kind as they rise and happen, in such manner and form as hath been of right yielded and paid within forty years next before the making of this act, or of right or custom ought to have been paid; and no person shall take or carry away any such or like tithes, which have been yielded or paid within the said forty years, or of right ought to have been paid in the place or places tithable of the same, before he hath justly divided or set forth for the tithe thereof the tenth part of the same, or otherwise agreed for the same tithes with the parson, vicar, or other owner, proprietary or farmer of the same tithe, under the pain of forfeiture of treble value of the tithes so taken or carried away."

Truly and justly, without Fraud or Guile.—In the case of *Heale v. Sprat*, T., 44 Eliz. In a prohibition: The case was, Heale did set out his prædial tithes, and divided them justly from the nine parts, and soon after carried the same away. Sprat sued for a subtraction of the same in the ecclesiastical court. Heale pleaded that he had set them out, as above. Whereunto Sprat said, that presently after his setting out, he carried the same away, to the defrauding of the statute. And it was adjudged, that this was fraud and guile within this act, albeit he did justly divide the same within the letter of this law. It was further resolved, that if the owner of the corn before severance grant the same to another, of intent that the grantee should take away the same, to the end to defraud the parson of his tithe, this is fraud and guile within the statute (k).

Prædial Tithes.—This branch extends only to prædial tithes. Thus in the case of *Booth and Southraie*, E., 1 Jac. 1 (l). In debt upon this statute by the parson of the church, for not setting forth the tithes of cheese, calves, lambs, cherries and pears, to have the treble value; the defendant pleaded *nihil debet*, and it was found against him. And it was moved in

(k) 2 Inst. 649.

(l) 2 Inst. 649; Cro. Eliz. 475.

2 & 3 Ed. 6,
c. 13.

arrest of judgment, that the said tithes of cheese, or calves and lambs, were not prædial tithes, and therefore not within this branch of the statute; and this act is penal, and shall not be taken by equity. Which was allowed by the whole court.

Within Forty Years next before the making of this Act.—This time of forty years is set down, because forty years in the ecclesiastical court about tithes make a prescription (m).

Or of Right or Custom ought to have been paid.—The sense of these words *of right ought to have been paid*, is of tithes to be yielded in specie within forty years; and the sense of the words *of right or custom*, is, by rightful custom *de modo decimandi* (n).

Or otherwise agreed for the same with the Parson, Vicar, or other Owner, Proprietary or Farmer of the said Tithes.—E., 6 Geo. 3, *Chave v. Calmel*. A prohibition was moved for to the consistorial court of the Bishop of Exeter, to stay proceeding in a cause instituted there, for subduction of tithes. The case was, that Mr. Calmel, the impropiator, had employed one Finnimore as his agent, to collect and compound for tithes. Chave, the occupier, had agreed with Finnimore, after the corn was cut and ready to be housed, for 5*l*. Whereupon he housed his whole crop, without setting out the tithes. Chave's agreement with Finnimore was only by parol. The impropiator libelled in the ecclesiastical court against Chave, for not setting out his tithes. Chave tendered the 5*l*., and offered a plea that he had purchased the tithes for 5*l*. The ecclesiastical court rejected this plea. The question was, Whether this was matter of appeal, or of prohibition? and the court were unanimous, that it was matter of prohibition. They founded their opinion upon this rejection of the plea being a grievance irreparable; and upon an apprehension, that the ecclesiastical court must have grounded their rejection upon a supposed difference between their law and the common law; that is to say, they took it for granted, that the ecclesiastical court were of opinion, agreeable to what is laid down by Bishop Gibson (who takes it from a note in Noy), that an agreement with the agent of a proprietor of tithes will not bind the proprietor: whereas by the common law, and in common sense and common justice, a composition by the occupier with the agent of the proprietor, doth bind, and ought to bind, his principal. Indeed, where the ecclesiastical court have jurisdiction, and proceed therein according to their law, where it doth not differ from the common law, the rejection of a plea would be matter of appeal. But where the ecclesiastical law differs from the common law; and the ecclesiastical court would require greater proof from the defendant, than the

(m) 2 Inst. 649; 1 Ought. 263.

Walker, 5 T. R. 260; *Hallewell v.*

(n) 2 Inst. 650; *Lord Mansfield v. Clarke*, 5 T. R. 264; *Mitchell v.*

Trapper, 2 Bos. & Pul. N. R. 173.

common law requires; or would esteem an agreement not to bind the impropiator, which at common law would bind him; there an appeal could be of no service to the defendant in the ecclesiastical court: because the superior ecclesiastical court would equally adhere to their own law, as the inferior ecclesiastical court had done; and would determine alike, as being guided by the same principle of determination. Therefore, as the judges of this court supposed that in the present case the judge of the Consistory Court rejected the plea because he thought the agreement with the agent not binding upon Mr. Calmel, the principal, which at common law did bind him, they held this to be matter of prohibition, and not of appeal. And though it had been observed, that tithes lie in grant, yet they had no doubt that the occupier might, with sufficient propriety, be said to have purchased these tithes, notwithstanding the contract was only by parol. For whatever might have been objected to its not being by deed, if this corn had been standing; or if it had been a sale by the proprietor of the tithes to a third person; yet the present case is by no means liable to such an objection: for the corn was here severed from the ground, and ready to be housed; and it was not a sale of the tithes by the proprietor to a stranger, but a composition between the proprietor and occupier, for that turn only (o).

Under the Pain of Forfeiture of Treble Value of the Tithes so taken and carried away.—This branch doth not give the forfeiture to any person in certain; and therefore it was pretended, that the forfeiture should be given to the king: and thereupon the attorney-general, H., 29 Eliz., did exhibit an information in the exchequer, against one *Wood*, a parishioner of Iclington, in the county of Cambridge, for this treble forfeiture, for carrying away his tithes before they were justly divided. The defendant pleaded not guilty; and by a jury at the bar he was found guilty: and in arrest of judgment it was moved, that in this case the forfeiture was not given to the king, for that the words of the act be, “under the pain of forfeiture of treble value of the tithes so taken away:” and whensoever a forfeiture is given against him that doth dispossess the owner of his property, as here he doth of his tithes, there the forfeiture is given to the party grieved or dispossessed; and the rather for that this is an additional law, and made for the benefit of the proprietor of the tithes. And so it was adjudged by Manwood, and the whole Court of Exchequer. And this was the first leading case that was adjudged upon this point; and ever since, it hath been received for law, that the party interested in the tithes shall in action of debt recover the treble value (p).

(o) Burrow, Mansf. 1873.

(p) 1 Inst. 159; 2 Inst. 650.

2 & 3 Ed. 6,
c. 13.

H., 47 Geo. 3, *Phillips v. Davies* (q). This was an action on the stat. 2 & 3 Edw. 6, c. 13, by the impropriator, to recover the treble value of the tithes of corn omitted to be set out by the defendant. At the trial, the defence set up was a custom to set out the eleventh mow of corn, instead of the tenth. The learned judge nonsuited the plaintiff, on the ground, that an action to recover a penalty was not a proper form of action to try a substantial question of right. A motion was made to set aside the nonsuit, and the Court of King's Bench held that the validity of this custom was fit to be tried in this form of action, though penal in its nature; being given to the party grieved, and his only remedy at common law, for the subtraction of the tithe due to him.

And it is to be observed, that the treble value only, and not the tithes themselves, nor any satisfaction for them, may be recovered in the temporal court: that being out of the jurisdiction of those courts, and wholly in the spiritual court. Which is the reason why in all suits upon this statute, the action is not laid for subtraction of tithes, but for a contempt of the statute, in not setting them out. And being a contempt, the action dies with him who committed the contempt, and doth not lie against his executor (r).

And it hath been held, that an action grounded on this statute, for not setting forth of tithes, is not within the statute of limitations; that statute not extending to actions grounded on acts of parliament; therefore the plaintiff is not by law confined to six years, or to any other time certain, within which to bring his action (s).

Thus, in the case of *Marston v. Clepole*, E., 1726 (t), on a bill by a lay impropriator for tithes in the Court of Exchequer, for about twenty-four years; the defendant, as to such part of the bill as prayed discovery and relief for any time before within six years next before filing the bill or serving the subpœna, pleaded the statute of limitations, and that he did not promise to make any satisfaction for any tithes before the said six years; but it was over-ruled by the court, because the defendant, as to tithes, is only in the nature of a receiver or bailiff for the plaintiff; in which case, the statute of limitations doth not operate.

If a jury give a verdict for the plaintiff, they must find the real value of the tithes, which shall be trebled by the court; as if the jury find the real and single value to be twenty pounds, they ought to give the plaintiff only so much, and the court shall treble it, and make that sum given by the jury to be sixty pounds, which is the treble value. But if the issue be upon the custom of tithing, or any other collateral point, the jury then need not to find any value of the tithes, for that

(q) 8 T. R. 178.

(r) Gibs. 697; 1 Vern. 60.

(s) Wats. c. 58.

(t) Bunb. 213.

in such case the defendant shall pay the value expressed by the plaintiff in his declaration; because, by the collateral matter pleaded in bar, the value of the tithes set forth in the declaration is confessed. Therefore, in all actions brought upon this statute, if the defendant plead any collateral matter in bar of the action, he must take the value of the tithes mentioned in the declaration by protestation; that is, he must by the form of a protestation aver, that the tithes were not of that value as is declared; otherwise he will be charged with the value the plaintiff hath by his declaration set upon them. And the same law is said to be, if judgment be given for the plaintiff by *nihil dicit, non sum informatus*, or upon demurrer (u).

2 & 3 Edw. 6,
c. 13.

And neither damages nor costs can be recovered with the treble value, because the statute hath not expressly given them, except that by the statute of the 8 & 9 Will. 1, c. 11, s. 3, it is enacted that, "In all actions of debt upon the statute for not setting forth of tithes, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles; the plaintiff obtaining judgment, or any award of execution after plea pleaded, or demurrer joined therein, shall recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs."

7. *Recovery of Double Value in the Ecclesiastical Court by the same Statute.*

By the aforesaid statute of the 2 & 3 Edw. 6, c. 13, s. 2, "At all times whensoever, and as often as any prædial tithes shall be due at the tithing of the same, it shall be lawful to every party to whom any of the said tithes ought to be paid, or his deputy or servant, to view and see their said tithes to be justly and truly set forth and severed from the nine parts, and the same quietly to take and carry away; and if any person carry away his corn or hay, or his other prædial tithes, before the tithe thereof be set forth, or willingly withdraw his tithes of the same, or of such other things whereof prædial tithes ought to be paid, or do stop or let the parson, vicar, proprietor, owner, or other their deputies or farmers, to view, take, and carry away their tithes as is abovesaid; by reason whereof the said tithe or tenth is lost, impaired or hurt; then upon due proof thereof made before the spiritual judge, or any other judge to whom heretofore he might have made complaint, the party so carrying away, withdrawing, letting or stopping, shall pay the double value of the tenth of tithe so taken, lost, withdrawn, or carried away, over and besides the costs, charges and expenses of the suit in the same; the same to be recovered

(u) Wats. c. 58.

2 & 3 Ed. 6,
c. 13.

before the ecclesiastical judge, according to the king's ecclesiastical laws."

Sect. 4. "Provided, that no person shall be sued, or otherwise compelled to yield, give or pay any manner of tithes, for any manors, lands, tenements or hereditaments, which by the laws and statutes of this realm, or by any privilege or prescription, are not chargeable with the payment of any such tithes, or that be discharged by any composition real."

Shall pay the double Value.—The reason why the double value is by this branch to be recovered in the ecclesiastical court, where by the former branch the parson at the common law shall recover the treble, is, for that in the ecclesiastical court he shall recover the tithes themselves; and therefore the value recovered in the ecclesiastical court is equivalent with the treble forfeiture at the common law (x).

And the double value, together with the statute, ought to be expressly mentioned in the libel; but yet the libel must be so ordered as not to be grounded directly upon the statute for more than double value, for if the single damages, that is, the value of the tithes, be also grounded upon it, this will be interpreted a suing in the spiritual court for treble value, and a prohibition will lie (y).

Over and besides the Costs, Charges, and Expenses.—So as the suit in the ecclesiastical court is more advantageous than the suit for the treble forfeiture at the common law. For at the common law he shall recover no costs, but he shall recover in the ecclesiastical court his costs, charges and expenses (z).

8. *Manner of Suing for Tithes in the Ecclesiastical Court.*

And by 2 & 3 Edw. 6, c. 13, s. 13, "If any person do subtract or withdraw any manner of tithes, obventions, profits, commodities, or other duties (before mentioned), or any part of them, contrary to the true meaning of this act, or of any other act heretofore made, the party so subtracting or withdrawing the same, may be convented and sued in the king's ecclesiastical court by the party from whom the same shall be subtracted or withdrawn, to the intent the king's ecclesiastical judge may hear and determine the same according to the king's ecclesiastical laws; and it shall not be lawful to the parson, vicar, proprietor, owner, or other their farmers or deputies, contrary to this act, to convent or sue such withholder of tithes, obventions, and other duties aforesaid, before any other judge than ecclesiastical."

Sect. 13. "And if any archbishop, bishop, chancellor, or other judge ecclesiastical, give any sentence in the aforesaid

(x) 2 Inst. 650.

(y) Godb. 245; Gibs. 697.

(z) 2 Inst. 651.

causes of tithes, obventions, profits, emoluments, and other duties aforesaid, or in any of them (and no appeal or prohibition hanging), and the party condemned do not obey the said sentence, it shall be lawful to every such judge ecclesiastical to excommunicate the said party so as aforesaid condemned and disobeying; in which sentence of excommunication, if the said party excommunicate wilfully stand and endure still excommunicate by the space of forty days next after, upon denunciation and publication thereof in the parish church, or the place or parish where the party so excommunicate is dwelling or most abiding, the said judge ecclesiastical may then, at his pleasure, signify to the king in his Court of Chancery, of the state and condition of the said party so excommunicate, and thereupon require process *de excommunicato capiendo* to be awarded against every such person as hath been so excommunicate.”

2 & 3 Ed. 6,
c. 13.

Sect. 14. “And if the party in such case shall sue for a prohibition, he shall, before any prohibition be granted, deliver to some of the justices or judge of the court where he demandeth prohibition, a true copy of the libel, subscribed by his hand; and under the copy of the said libel shall be written the suggestion wherefore he demandeth the prohibition: and in case the said suggestion, by two honest and sufficient witnesses at least, be not proved true in the court where the said prohibition shall be so granted within six months next following after the said prohibition shall be so granted and awarded, then the party that is letted or hindered of his suit in the ecclesiastical court by such prohibition, shall, upon his request and suit, without delay, have a consultation granted by the same court; and shall also recover double costs and damages against the party that so pursued the prohibition, to be assigned or assessed by the same court, for which costs and damages the party may have an action of debt.”

Sect. 15. “Provided, that nothing herein shall extend to give any minister or judge ecclesiastical, any jurisdiction to hold plea of any matter, cause or thing, contrary to the statute of Westminster, ii. c. 5, the statutes of *Articuli Cleri*, *Circumspectè agatis*, *Sylva Cædua*, the treatise *De Regia Prohibitione*, nor against the statute of 1 Edw. 3, c. 10; nor to hold plea in any matter whereof the king's court of right ought to have jurisdiction.”

Sect. 13, *May be convented.*]—In the case of *Machin v. Molton* (a), E., 11 Will. 1, it was moved for the discharge of a rule by which a prohibition was granted, unless cause showed to the Consistory Court of the Archbishop of York, where Molton, rector of the church of South Collingham, in the diocese of York, preferred a libel against Machin for subtraction

(a) Ld. Raym. 452, 534.

2 & 3 Ed. 6,
c. 13.

of tithes. And the motion for the prohibition was grounded upon a suggestion, that Machin lived within the diocese of Lincoln, and therefore ought not to be cited out of the diocese where he lived, by the 23 Hen. 8, c. 9. And the cause which was showed to the court to discharge the rule was, because Machin had lands within the diocese of York, namely, in the parish of South Collingham, for the tithes of corn growing upon which lands Molton libelled in the Consistory Court of York, and when the citation was served, Machin was there, though he lived generally within the diocese of Lincoln. And by Holt, Chief Justice:—If a man lives within the diocese of A. and occupies lands in the diocese of B., if he subtracts tithes in B., he may be cited and sued there, and it is not within the said statute; for when he occupies lands in B. that makes him an inhabitant there, and out of the intent of the statute; and by the statute of the 32 Hen. 8, c. 7, s. 2, the suit for withholding of tithes in express words is appointed to be before the ordinary of the place where the wrong was done.

Or the Place or Parish.]—It seemeth that the words should be, of the place or parish.

Sect. 14, *By two honest and sufficient Witnesses at least.*]—This clause was made in favour of the clergy for proof to be made by witnesses, which they had not at the common law. But if the suggestion be in the negative, as if the proprietary of a parsonage impropriate sue for tithes, and the cause of the suggestion be, that the parsonage is not impropriate; or if a parson sue for tithes of lands in his parish, and the party sue for a prohibition for that the land lieth not in that parish, or that the parson that sueth for tithes was not inducted, or any the like cause in the negative of any matter of fact; he shall not produce any witnesses by force of his branch, because a negative cannot be proved; and therefore a prohibition upon causes in the negative remains as it was at the common law (b).

Proved true.]—It is sufficient in this case that enough is proved upon which to ground a prohibition, though the suggestion be not shown to be strictly and wholly true. So where the suggestion was for twenty acres of pasture, and as many acres of wood in lieu of tithes, and proof was only made of the wood; or where the suggestion was for wool and lamb, and the witnesses only proved as to the lamb; or for a hundred acres, when there were only sixty; or for twenty shillings by way of modus, where the sum was forty shillings; in these cases, the proofs were adjudged to be sufficient, because enough was proved to show that the Court Christian ought not to hold plea thereof. But if proof is neither made of the modus laid nor of any other modus, then the suggestion is not proved (c).

As to the clearness of the evidence, it is sufficient in this

(b) 2 Inst. 662.

(c) Gibs. 669.

case, if the witnesses do declare as to the matter of the suggestion, that they believe it, or have known it so, or have heard it, or that there is a common fame of it (*d*).

Within six Months.]—If there is no certainty in the first proof, it cannot be supplied by good proof after the six months; but if good proof is made within the time, it may be certified after the time (*e*).

Six Months.]—That is, six calendar months; and not to be reckoned by twenty-eight days to the month (*f*).

Six Months next following.]—Which must be computed from the teste of the writ; and not six months in the term time only, but the vacation shall be included as part of the time (*g*).

Have a Consultation granted.]—After which the party may have a new prohibition upon the same libel; inasmuch as the statute of the 50 Edw. 3, against prohibition after consultation, extends not to those consultations for defect of proof within six months, but only to consultations which are granted upon the matter of the suggestion (*h*).

Sect. 15. *Contrary to the Statute of Westminster the Second.*]—Whereby the writ of *indicavit*, and the writ of right of the fourth part of tithes, and all dependancies thereupon, are saved (*i*).

The Statutes of Articuli Cleri, Circumspectè agatis, Sylva Cædua.]—All which, with respect unto tithes, are specified in this title.

The Treatise De Regia Prohibitione.]—Which is that which is entitled *Prohibitio formata super articulis* (*k*).

Nor against the Statute of the 1 Edw. 3, c. 10.]—This is misprinted; for the act is 1 Edw. 3, st. 2, c. 11, that if any suit be in the spiritual court against indictors, a prohibition doth lie (*l*).

Contempt of the process or definitive sentence of the ecclesiastical courts in suits for tithes may be punished by application to any of the king's honourable council, or two justices of the peace for the shire (*m*), as well as by ecclesiastical censures.

E., 44 Geo. 3, *Sandby v. Miller*. The plaintiff in this case brought an action at the sittings at Westminster, as vicar of St. Giles, Camberwell, to recover the value of tithes due to him from certain tenements within the vicarage, in the occupation of the defendant, and obtained, upon a count in assumpsit for a *quantum valebant*, a verdict of 7s. 6d., which, together

(*d*) Gibs. 699.

(*e*) Gibs. 700.

(*f*) 2 Salk. 554.

(*g*) Ibid.; Ld. Raym. 1172.

(*h*) Gibs. 700.

(*i*) 2 Inst. 663.

(*k*) Vet. Magn. Chart. pt. 2, fol. 7;

2 Inst. 663.

(*l*) 2 Inst. 663.

(*m*) Vide 27 Hen. 8, c. 20, and 32 Hen. 8, c. 7, ante.

with 2*l.* 14*s.* 3*d.* paid into court, constituted the original amount of his demand. A motion was made for leave to enter a suggestion on the roll to exclude the plaintiff from his costs, under stat. 39 & 40 Geo. 3, c. 104, on the ground of the defendant being resident, and liable to be summoned, within the jurisdiction of the Court of Requests for the city of London, and that the original debt sued for did not exceed 5*l.* The plaintiff resisted the motion, upon the ground that this being a demand in respect to tithes, came within the *exception* contained in the 11th sect. of the act, viz. "*a thing concerning and properly belonging to the ecclesiastical court,*" and therefore was not within the jurisdiction of the Court of Requests. The court were of opinion, that the *subject of the action* being the recovery upon a promise of an equivalent for tithes retained, it should have been brought in the Court of Requests; and that the defendant was entitled to make his rule absolute (n).

9. *Suits for small Tithes before Justices of the Peace(o).*

7 & 8 Will.
3, c. 6.

By the 7 & 8 Will. 3, c. 6, s. 1, "For the more easy and effectual recovery of small tithes, and the value of them, where the same shall be unduly subtracted and detained, where the same do not amount to above the yearly value of forty shillings from any one person; it is enacted, that all persons shall well and truly set out and pay all and singular the tithes commonly called small tithes, and compositions and agreements for the same, with all offerings, oblations, and obventions, to the several rectors, vicars, and other persons to whom they shall be due in their several parishes, according to the rights, customs, and prescriptions commonly used within the said parishes respectively: And if any person shall subtract or withdraw, or any ways fail in the true payment of such small tithes, offerings, oblations, obventions, or compositions, by the space of twenty days at most after demand thereof, it shall be lawful for the person to whom the same shall be due to make his complaint in writing to two or more justices of the peace within that county, place, or division where the same shall grow due, neither of which justices is to be patron of the church or chapel whence the said tithes shall arise, nor any ways interested in such tithes, offerings, oblations, obventions, or compositions aforesaid."

Sect. 2. "And on such complaint, the said justices shall summon in writing under their hands and seals, by reasonable warning, every such person against whom such complaint shall be made; and after his appearance, or upon default of appearance, the said warning or summons being proved before them

(n) 5 East's Rep. 194.

(o) For the forms of process upon

this and the two following acts, see 4 Burn's J. P. title *Tithes*.

upon oath, the said justices shall proceed to hear and determine the said complaint, and upon the proofs, evidences, and testimonies produced before them, shall in writing under their hands and seals adjudge the case, and give such reasonable allowance and compensation for such tithes, oblations, and compositions so subtracted or withheld as they shall judge to be just and reasonable, and also such costs and charges, not exceeding ten shillings, as upon the merits of the cause shall appear just.”

7 & 8 Will. 3,
c. 6.

Sect. 3. “And if any person shall refuse or neglect, for the space of ten days after notice given, to pay or satisfy any such sum of money, as upon such complaint and proceeding shall by two such justices be adjudged as aforesaid, in every such case the constables and churchwardens of the said parish, or one of them, shall by warrant under the hands and seals of the said justices to them directed, distrain the goods and chattels of the party so refusing or neglecting as aforesaid; and after detaining them [not less than four days, nor more than eight, 27 Geo. 2, c. 20], in case the said sum so adjudged, together with reasonable charges of making and detaining the said distress, be not tendered or paid by the said party in the mean time, shall make public sale thereof, and pay to the party complaining so much of the money arising by such sale, as may satisfy the said sum so adjudged, retaining to themselves such reasonable charges for making and keeping the said distress as the said justices shall think fit [and also deducting their reasonable charges of selling the said distress; returning the overplus (if any shall be) to the owner upon demand. 27 Geo. 2, c. 20].”

Sect. 4. “And the said justices shall have power to administer an oath.”

Sect. 5. “Provided, that this act shall not extend to any tithes, oblations, payments, or obventions, within the city of London or liberties thereof, nor to any other city or town corporate where the same are settled by act of parliament.”

Sect. 6. “And no complaint shall be heard and determined by the said justices, unless the complaint shall be made within two years next after the times that the same tithes, oblations, obventions, and compositions did become due.”

Sect. 7. “Provided also, that any person finding himself aggrieved by any judgment to be given by two such justices, may appeal to the next general quarter sessions to be held for that county or other division; and the justices there shall proceed finally to hear and determine the matter, and to reverse the said judgment if they shall see cause; and if they shall find cause to confirm the said judgment, they shall decree the same by order of sessions, and shall also proceed to give such costs against the appellant, to be levied by distress and sale of the goods and chattels of the said appellant, as to them shall

7 & 7 Will. 3,
c. 6.

seem just and reasonable. And no proceedings or judgment had by virtue of this act shall be removed or superseded by any writ of *certiorari*, or other writs out of his majesty's courts at Westminster, or any other court, unless the title of such tithes, oblations, or obventions shall be in question."

Sect. 8. "Provided, that where any person complained of for subtracting or withholding any small tithes or other duties aforesaid, shall before the justices to whom such complaint is made, insist upon any prescription, composition, or *modus decimandi*, agreement, or title, whereby he ought to be freed from payment of the said tithes or other dues in question, and deliver the same in writing to the said justices subscribed by him; and shall then give to the party complaining reasonable and sufficient security, to the satisfaction of the said justices, to pay all such costs and damages, as upon a trial at law to be had for that purpose in any of his majesty's courts having cognizance of that matter, shall be given against him, in case the said prescription, composition, or *modus decimandi* shall not upon the said trial be allowed; in that case, the said justices shall forbear to give any judgment in the matter, and then and in such case the party complaining shall be at liberty to prosecute such person for his said subtraction in any other court where he might have sued before the making of this act."

[A party summoned under this act, who resists the payment of tithe on the ground of a *modus* under this last section, must set up the *modus* before the justices in the first instance; and if he neglect to do so, and an order is made by the justices, he cannot, on appeal to the sessions, give evidence of the *modus*. It should seem that this eighth section takes away from the justices the power of trying a question of *modus* in any case (p). —ED.]

Sect. 9. "And every person who shall by virtue of this act obtain any judgment, or against whom any judgment shall be obtained before any justices of the peace out of sessions, for small tithes, oblations, obventions, or compositions, shall cause or procure the said judgment to be inrolled at the next general quarter session to be held for the said county or other division; and the clerk of the peace shall upon the tender thereof inroll the same, and shall not receive for the inrollment of any one judgment any fee or reward exceeding one shilling; and the judgment so inrolled, and satisfaction made by paying the sum adjudged, shall be a good bar to conclude the said rectors, vicars, and other persons, from any other remedy for the said small tithes, oblations, obventions, or compositions, for which the said judgment was obtained."

Sect. 10. "And if any person against whom such judgment

(p) [*Rex v. Jeffereys*, 1 B. & C. & Y. 153; *Rex v. Furness*, 11 Mod. 604; 2 D. & R. 860; 3 E. & Y. 1098; 320; 1 Str. 264; 1 E. & Y. 750.]
Rex v. Wakefield, 1 Burr. 485; 2 E.

shall be had shall remove out of the county or other division before the levying of the sum adjudged, the justices who made the judgment, or one of them, shall certify the same under hand and seal to any justice of such other county or place wherein the said person shall be an inhabitant; who shall, by warrant under his hand and seal, to be directed to the constables or churchwardens of the place, or one of them, levy the sum so adjudged to be levied upon the goods and chattels of such person, as fully as the said other justices might have done if he had not removed as aforesaid.”

7 & 8 Will. 3,
c. 6.

Sect. 12. “And the justices who shall hear and determine any of the matters aforesaid, shall have power to give costs, not exceeding ten shillings, to the party prosecuted, if they shall find the complaint to be false and vexatious, to be levied in manner and form aforesaid.”

Sect. 13. “And if any person shall be sued for anything done in the execution of this act, and the plaintiff in such suit shall discontinue his action, or be non-suit, or a verdict pass against him, such persons shall recover double costs.”

Sect. 14. “Provided, that any clerk or other person who shall begin any suit for recovery of small tithes, oblations, or obventions, not exceeding the value of forty shillings, in his majesty’s court of exchequer, or in any of the ecclesiastical courts, shall have no benefit by this act for the same matter for for which he hath so sued.”

[By 7 Geo. 4, c. 15, in places where the justices are patrons of the church, the parties are to be summoned before two justices of any adjoining county, riding, or division. By 53 Geo. 3, c. 127, one justice is competent to receive original complaint, and summon the parties to appear before two or more justices.—ED.]

10. *Suit for Quakers’ Tithes before Justices of the Peace.*

By the 7 & 8 Will. 3, c. 34, s. 4, “Whereas by reason of a pretended scruple of conscience, Quakers do refuse to pay tithes and church rates; it is enacted, that where any Quaker shall refuse to pay or compound for his great or small tithes, or to pay any church rates, it shall be lawful for the two next justices of the peace of the same county (other than such justice as is patron of the church or chapel whence the said tithes shall arise, or anyways interested in the said tithes), upon the complaint of any parson, vicar, farmer, or proprietor of tithes, churchwarden or churchwardens, who ought to have received or collected the same, by warrant under their hands and seals, to convene before them such Quaker or Quakers neglecting or refusing to pay or compound for the same, and to examine upon oath (or affirmation, in case of the examination of a Quaker) the truth and justice of the said complaint, and to

7 & 8 Will.
3, c. 34.

7 & 8 Will. 3,
c. 34.

ascertain and state what is due and payable; and by order under their hands and seals to direct and appoint the payment thereof, so as the sum ordered do not exceed ten pounds: and upon refusal to pay according to such order, it shall be lawful for any one of the said justices, by warrant under his hand and seal, to levy the same by distress and sale of the goods of such offender, his executors or administrators, rendering only the overplus to him or them, the necessary charges of distraining being thereout first deducted and allowed by the said justice. And any person finding himself aggrieved by any judgment given by such two justices, may appeal to the next general quarter sessions to be held for the county, riding, city, liberty, or town corporate; and the justices there shall proceed finally to hear and determine the matter, and to reverse the said judgment if they see cause; and if they shall find cause to continue the said judgment, they shall then decree the same by order of sessions, and shall also proceed to give such costs against the appellant, to be levied by distress and sale of the goods and chattels of the said appellant, as to them shall seem just and reasonable. And no proceedings or judgment had by virtue of this act shall be removed or superseded by any writ of *certiorari* or other writ out of his majesty's courts at Westminster, or any other court whatsoever, unless the title of such tithes shall be in question."

Sect. 5. "Provided, that in case any such appeal be made as aforesaid, no warrant of distress shall be granted until after such appeal be determined."

And by the 1 Geo. stat. 2, c. 6, s. 2, "The like remedy shall be had against any Quaker or Quakers for the recovering of any tithes or rates, or any customary or other rights, dues, or payments belonging to any church or chapel, which of right by law and custom ought to be paid, for the stipend or maintenance of any minister or curate officiating in any church or chapel; and any two or more justices of the peace of the same county or place (other than such justice as is patron of any church or chapel, or anywise interested in the said tithes), upon complaint of any parson, vicar, curate, farmer, or proprietor of such tithes, or any churchwarden or chapelwarden, or other person who ought to have, receive, or collect any such tithes, rates, dues, or payments as aforesaid, are authorized and required to summon in writing under their hand and seals, by reasonable warning, such Quaker or Quakers against whom such complaint shall be made; and after his or their appearance, or upon default of appearance, the said warning or summons being proved before them upon oath, to proceed to hear and determine the said complaint, and to make such order therein as in the aforesaid act is limited; and also to order such costs and charges as they shall think reasonable, not exceeding ten shillings, as upon

the merits of the cause shall appear just; which order shall and may be so executed, and on such appeal may be reversed or affirmed by the general quarter sessions, with such costs and remedy for the same; and shall not be removed into any other court, unless the titles of such tithes, dues, or payments shall be in question, in like manner as by the aforesaid act is limited and provided."

And by the 27 Geo. 2, c. 20, which directeth in what manner distresses shall be made by justices of the peace, and which gives to the justices power to order the goods distrained to be kept for a certain time before they be sold, and gives power also to the officers making the distress to deduct their reasonable charges, it is provided that the same shall not extend to alter any provisions relating to distresses to be made for the payment of tithes and church rates by the people called Quakers, contained in the acts of the 7 & 8 Will. 3, c. 34, and the 1 Geo. 1, stat. 2, c. 6 (q).

[The 53 Geo. 3, c. 127, intituled "An Act for the better Regulation of Ecclesiastical Courts in England, and for the more easy Recovery of Church Rates and Tithes(r)," enacted—

53 Geo. 3,
c. 127.

[Sect. 4. "And whereas in the seventh and eighth years of King William the Third an act was made and passed, intituled 'An Act for the more easy Recovery of Small Tithes,' whereby, amongst other things therein enacted, two or more of his majesty's justices of the peace are authorized and required to hear and determine complaints touching tithes, oblations, and compositions subtracted or withheld, not exceeding forty shillings: And whereas it has become expedient to enlarge such amount, and also to extend the said act to all tithes whatsoever of certain limited amount; Be it enacted, That such justices of the peace shall, from and after the passing of this act, be authorized and required to hear and determine all complaints touching tithes, oblations, and compositions subtracted or withheld, where the same shall not exceed ten pounds in amount from any one person, in all such cases, and by all such means, and subject to all such provisions and remedies, by appeal or otherwise, as are contained in the said act of King William, touching small tithes, oblations, and compositions not exceeding forty shillings: Provided always, nevertheless, that from and after the passing of this act, one justice of the peace shall be competent to receive the original complaint, and to summon the parties to appear before two or more justices of the peace, as in the said act is set forth."

Justices of
Peace may
determine
Complaints
respecting
Tithes not
exceeding
Ten Pounds.

[Sect. 5. "And be it further enacted, that from and after the passing of this act, no action shall be brought for the recovery of any penalty for the not setting out tithes, nor any suit instituted in any court of equity, or in any ecclesiastical court, to recover the value of any tithes, unless such action shall be brought or such

Limitation of
Actions re-
specting
Tithes.

(q) [See Lord Mansfield's judgment in *Rex v. Roger Wakefield*, under these acts.]

(r) [See this act at length under the title *Excommunication*, vol. ii. p. 260.]

53 Geo. 3,
c. 127.

suit commenced within six years from the time when such tithes became due."

7 & 8 Will. 3,
c. 34, s. 4,
and 1 Geo. 1,
stat. 2, c. 6,
s. 2.

[Sect. 6. "And whereas in the seventh and eighth years of King William the Third, an act was made and passed, intituled 'An Act that the solemn Affirmation and Declaration of the People called Quakers shall be accepted instead of an Oath in the usual Form,' whereby, among other things, it is therein enacted, where any Quaker shall refuse to pay for or compound for his great or small tithes, or to pay any church rates, two or more of his majesty's justices of the peace are authorized to hear and determine the same, not exceeding the value of ten pounds: And whereas by a statute made and passed in the first year of King George the First, the said act is extended to other objects: And whereas it is become expedient to enlarge the said sum; Be it enacted, that from and after the passing of this act, all the provisions of the said acts of King William and King George shall be deemed and taken to extend to any value not exceeding fifty pounds: Provided always, nevertheless, that from and after the passing of this act, one justice of the peace shall be competent to receive the original complaint, and to summon the parties to appear before two or more justices of the peace, as in the said act is set forth."

as to Quakers
neglecting to
pay Tithes,
&c. extended.

[In September, 1835, was passed 5 & 6 Will. 4, c. 74, intituled "An Act for the more easy Recovery of Tithes."

5 & 6 Will.
4, c. 74.

7 & 8 Will. 3,
c. 6.

[Sect. 1. "Whereas an act was passed in the seventh and eighth years of the reign of King William the Third, intituled 'An Act for the more easy Recovery of Small Tithes,' whereby it was amongst other things enacted, that two or more of his majesty's justices of the peace were authorized and required to hear and determine complaints touching small tithes, oblations, and compositions subtracted or withheld, not exceeding forty shillings: And whereas an act was passed in the fifty-third year of the reign of his late majesty King George the Third, intituled 'An Act for the better Regulation of Ecclesiastical Courts in England, and for the more easy Recovery of Church Rates and Tithes,' whereby the jurisdiction of the said justices was extended to all tithes, oblations, and compositions subtracted or withheld, where the same should not exceed ten pounds in amount from any one person: And whereas by an act of the seventh and eighth years of the reign of King William the Third, Chapter Thirty-four, provision is made for the recovery of great and small tithes (not exceeding the amount of ten pounds) due from Quakers, by distress and sale, under the warrant of two justices: And whereas by an act of the first year of the reign of King George the First, Chapter Six, the provisions of the said last-mentioned act were extended, in the case of Quakers, to all tithes or rates, and customary rights, dues, and payments belonging to any church or chapel: And whereas by the said recited act of the fifty-third year of the reign of King George the Third the aforesaid provisions in relation to Quakers were amended, and were also made applicable to any amount not exceeding fifty pounds: And whereas by an act of the parliament of Ireland of the seventh year of the reign of King George the Third, Chapter Twenty-one, amended and extended by an act of the par-

53 Geo. 3,
c. 127.

liament of the United Kingdom of the fifty-fourth year of the reign of King George the Third, Chapter Sixty-eight, similar provisions are in force in Ireland for the recovery, from Quakers, of great and small tithes, and customary and other rights, dues, and payments belonging to any church or chapel, not exceeding the amount of fifty pounds: And whereas it is highly expedient, and would further tend to prevent litigation, if, in the cases and with the exceptions hereinafter mentioned, all claimants were restricted to the respective remedies provided by the said recited acts: Be it therefore enacted &c. That from and after the passing of this act no suit or other proceeding shall be had or instituted in any of his majesty's courts in England now having cognizance of such matter for or in respect of any tithes, oblations, or compositions withheld, of or under the yearly value of ten pounds (save and except in the cases provided for in the two first-recited acts), but that all complaints touching the same shall, except in the case of Quakers, be heard and determined only under the powers and provisions contained in the said two first-recited acts of parliament in such and the same manner as if the same were herein set forth and re-enacted; and that no suit or other proceeding shall be had or instituted in any of his majesty's courts either in England or Ireland now having cognizance of such matter, for or in respect of any great or small tithes, moduses, compositions, rates, or other ecclesiastical dues or demands whatsoever, of or under the value of fifty pounds, withheld by any Quaker either in England or Ireland; but that all complaints touching the same, if in England, shall be heard and determined only under the powers and provisions contained in the said recited acts of the seventh and eighth years of King William the Third, Chapter Thirty-four, and the fifty-third year of King George the Third; and if in Ireland under the said recited act of the parliament of Ireland, of the seventh year of King George the Third, and the said recited act of the fifty-fourth year of King George the Third, in the same manner as if the same were herein set forth and re-enacted: Provided always, that nothing hereinbefore contained shall extend to any case in which the actual title to any tithe, oblation, composition, modus, due, or demand, or the rate of such composition or modus, or the actual liability or exemption of the property to or from any such tithe, oblation, composition, modus, due, or demand, shall be *bonâ fide* in question, nor to any case in which any suit or other proceeding shall have been actually instituted before the passing of this act."

5 & 6 Will. 4,
c. 74.

Proceedings
for the Reco-
very of Tithes
under 10l.
(except in the
case of Qua-
kers) shall be
had only un-
der the Pow-
ers of the two
first-recited
Acts.

Proviso.

[Sect. 2. "That in case any suit or other proceeding has been prosecuted or commenced, or shall hereafter be prosecuted or commenced, in any of his majesty's courts in England or Ireland, for recovering any great or small tithes, modus or composition for tithes, rate or other ecclesiastical demand, subtracted, unpaid, or withheld by or due from any Quaker, no execution or decree or order shall issue or be made against the person or persons of the defendant or defendants, but the plaintiff or plaintiffs shall and may have his execution or decree against the goods or other property of the defendant or defendants; and in case any person now is detained in custody in England or Ireland under any execution or

Manner of
recovering
Tithes due
from Quakers.

decree in such suit or proceeding, the sheriff or other officer having such person in his custody shall forthwith discharge him therefrom; and the plaintiff or plaintiffs in such suit or proceeding shall and may, notwithstanding such discharge, issue any other execution or take any other proceeding for recovering his demand and his costs out of the property, real or personal, of the person so discharged."

[Lastly, this act was amended in June, 1841, by 4 & 5 Vict. c. 36, the object of which was to take away all jurisdiction from the ecclesiastical courts in all matters relating to tithes of a certain amount; it enacted as follows:

4 & 5 Vict.
c. 36.

5 & 6 Will. 4,
c. 74.

Enactments
and Provi-
sions of re-
cited Act re-
specting Pro-
ceedings for
the Recovery
of certain
Tithes and
other Eccle-
siastical Dues
extended to
all Ecclesias-
tical Courts
in England.

["Whereas it is expedient to extend all the provisions of an act passed in the fifth and sixth years of his late majesty King William the Fourth, intituled 'An Act for the more easy Recovery of Tithes,' to all suits in the ecclesiastical courts hereafter to be commenced for the recovery of any tithes, oblations, or compositions of or under the yearly value of ten pounds, and of any great or small tithes, moduses, compositions, rates, or other ecclesiastical dues or demands whatsoever, of or under the value of fifty pounds, withheld by any Quaker: Be it therefore enacted, &c. that from and after the passing of this act, all the enactments and provisions of the said recited act passed in the fifth and sixth years of his late majesty King William the Fourth, respecting suits or other proceedings in any of her Majesty's courts in England, in respect of tithes, oblations and compositions of or under the yearly value of ten pounds, and of any great or small tithes, moduses, compositions, rates or other ecclesiastical dues or demands whatsoever, of or under the value of fifty pounds, withheld by any Quaker, shall extend and be applied to all ecclesiastical courts in England."—ED.]

11. *Tithes severed to be sued for in the Temporal Courts only.*

Tithes being set out (s), or severed from the nine parts, become lay chattels. Upon which foundation, when the tithe of corn was set out in sheaves, and the parson would not take it, but prayed remedy in the spiritual court, a prohibition was granted. And when a sequestration was prayed in the temporal courts, of tithes not set out, the right of which was in controversy, the party was told his request had been reasonable if they had been severed from the nine parts. For the same reason, if after severance they are carried away by a stranger, the remedy is in the temporal courts; but otherwise if they are carried away by the owner: because his setting them out, in order to carry them away, is a fraudulent setting out (t).

And judgment of *præmunire* hath been given against a man

(s) See *post*.

(t) Gibs. 689. See *Blackwell's case*, Cro. Eliz. 607, 843.

for suing in the spiritual court for tithes, alleging the same to be severed from the nine parts (*u*).

12. *Suit for Tithes in the Courts of Equity.*

Notwithstanding all these statutes, tithes (if of any considerable value) are now generally sued for in the courts of equity by English bill, and for the most part in the Exchequer Chamber; but not upon the statute for treble or double value; for there can be no suit in equity for the recovery of the double or treble value (*x*).

The Court of Exchequer hath an original and complete jurisdiction over tithes, and will decree an account and payment of the arrears of them (*y*). The same relief may be had by a bill filed in the Court of Chancery. And where the title to tithes is clearly made out, although not supported by possession, these courts will decree an account, without an issue (*z*).

13. *Incumbent dying.*

If the incumbent dieth, his executor may recover the tithes which became due in the testator's lifetime; but he is not entitled to the treble value upon the statute (*a*). [See the titles *Lease and Vacation*.]

XVI. *Of the setting out, and the manner of taking and carrying away of Tithes.*

By a constitution of Archbishop Winchelsea it is ordained as follows: "Because by reason of divers customs in the taking of tithes throughout divers churches, quarrels, contentions, scandals, and very great hatred between the rectors of the churches and their parishioners do oftentimes arise, we will and ordain, that in all the churches established throughout the province of Canterbury, there be one uniform taking of tithes and profits of the churches (*b*).

Between the Rectors of Churches.]—Which is to be understood also of vicars where the tithes belong to their portion (*c*).

Throughout the Provinces.]—*Per provinciam*: Lindwood says, in some copies, it was *archiepisopatum* (as also it was in

General
manner of
setting out.

(*u*) 3 Inst. 121.

(*x*) Wood, b. 2, c. 2; Vin. Dismes, M. b.; Chapman v. Beard, 4 Gwill. 1482.

(*y*) Lane, 100.

(*z*) Lygon v. Strutt, 2 Anst. 601. See also Foxcroft v. Parris, 5 Ves. 221; Garnons v. Barnard, 4 Gwill,

1462; Baker v. Athil, 2 Anst. 493; Bell v. Reed, Bunb. 193; Wools v. Walley, 1 Anst. 100; Chamberlaine v. Newte, 2 P. Wms. 463, in note; 3 Atk. 590, and 1 Bro. P. C. 157.

(*a*) 1 Vern. 60.

(*b*) Lind. 192.

(*c*) Ibid.

Archbishop Grey's constitutions, from whence this was taken); but in a provincial council held at London under Archbishop Chicheley, the word *archiepiscopatum*, by consent of the prelates and the whole clergy, was taken away, and *provinciam* inserted in its place, Lindwood himself being then prolocutor (*d*).

And Profits of the Church.]—That is, which do not consist in tithes; as oblations, mortuaries and such like (*e*).

But notwithstanding the canon, the manner or form of setting out or payment of tithes is for the most part governed by the custom of the place.

Hall v. Macket and others (*f*). In this case one of the defendants occupied a meadow of *nine acres*, which he cut down at four several times, and set out the tithe of each cutting separately as it was cut. The plaintiff objected, that cutting down so small a field at four different times could only be justified from absolute necessity, as it gave so much trouble to the clergyman. Court held that a farmer may cut down a field in any portions most convenient to himself, provided he set out the tithe of all cut down at any one time, before any part of it is carried away, and provided it be not done vexatiously.

Not before
the Crop is
cut.

Parson may
not set it out.

If the owner will not cut his crop before it be spoiled, the parson is without remedy (*g*).

The parson, vicar, impropriator or farmer cannot come himself and set forth his tithes without the licence and consent of the owner; for if he shall of his own head tithe the corn or hay of any landholder within his parish, and carry it away, he is a trespasser, and an action will lie against him for it (*h*).

Yet he may
see it set out.

But every person is bound of common right to cut down and set out the tithes of his own lands. And that it may be done faithfully and without fraud, the laws of the church entitle the parson to have notice given him; but by the declaration of the common law, such notice is not necessary. Yet nevertheless the common law declareth a custom of tithing without view to be an absurd custom (*i*). And by the statute of the 2 & 3 Edw. 6, c. 13, it is enacted, that at all times whensoever, and as often as any prædial tithes shall be due at the tithing of the same, it shall be lawful to every party to whom any of the said tithes ought to be paid, or his deputy or servant, to view and see their said tithes to be justly and truly set forth and severed from the nine parts.

In *Erskine v. Ruffe* (*k*), the Court of Exchequer held, contrary to a former opinion, that it is not necessary to cut down all the corn growing in a field before the tithe of any part can

(*d*) Lind. 192.

(*e*) Lind. 122.

(*f*) 4 Gwill. 1460.

(*g*) God. 394.

(*h*) Deg. p. 2, c. 14.

(*i*) Being *absque visu et tactu*. 6 Com. Dig. 303. See *Boughton v. Wright*, Bunb. 186.

(*k*) 5 Bac. Abr. 74, 75.

be set out, but that the tithe may be set out as often as a reasonable quantity is cut down. And that unless there be a custom of the parish to set out the tithe of barley in some other manner, it must be gathered into cocks, and every tenth cock set out for tithes.

E., 6 Geo. 3, Butter v. Heathby (l). An action upon the case was brought against the defendant for not fetching away his tithes in a reasonable time. The declaration states, that the plaintiff set out the tithes, and the defendant refused to fetch them away. At the trial the defendant's counsel insisted on a custom in the parish, that notice should be given to the owner of the tithes, of the setting them out. The judge who tried the cause held the custom not to be a good one; and a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench upon the following question, viz. Whether the custom be good in law or not? A motion had been made for a new trial and a rule to show cause. The counsel for the plaintiff denied this to be a good custom, because it was only setting up the ecclesiastical law against the common law of the kingdom, which cannot be done by custom in any particular district. By Mr. Justice Wilmot: "By the common law no notice is necessary. By the ecclesiastical law it is necessary. The question therefore is, Whether the ecclesiastical law can be introduced under the notion of such a custom? This was agreed to be the question. The plaintiff's counsel objected that this custom is not a reasonable or good one, because it is not founded upon any consideration. The farmer can receive no benefit by giving such notice: on the contrary, he may be much incommoded by being bound down to set them out at the particular time notified. Indeed, notice to the owner of the tithes of their having been set out, is previously necessary to the bringing an action for not carrying them away. And this notice was given. The counsel for the defendant, who argued in support of the rule for a new trial, admitted that the common law doth not require the notice of setting them out. But this custom does require it; and they insisted that it is a good custom. The consideration of customs cannot be inquired into. However, if it were necessary to do so, honesty and piety are sufficient considerations for this custom. But customs must be presumed to have sprung from good considerations. This custom prevails in half the parishes in the west of England; and as tithes depend in a great measure upon custom, so also does the manner of setting them out. In a cause at nisi prius, in the case of one Yarborough, at Lincoln assizes, Lord Chief Justice Willes held such a custom to be good, and said he wished it were the law of the land. After having taken time to consider of it, Lord

Custom that
Notice should
be given.

Custom that
Notice should
be given.

Mansfield delivered the opinion of the court: "The only question is, Whether this be a reasonable custom or not. There is no authority that comes up to this point but one, and that was a cause on the midland circuit, before Lord Chief Justice Willes, who thought it a reasonable custom. I think so too. I believe the doubt about it arose from a jealousy of receiving the ecclesiastical law in any case whatever, lest the clergy should introduce it by degrees. It is reasonable, as promotive of justice and preventive of fraud. Mr. Dunning said, as of his own knowledge, that there were such customs in the west of England; and I am told there are such in Lincolnshire. We are all clear that it is a good custom. It is for the prevention of fraud and for the convenience of the parties. Therefore the rule must be made absolute for a new trial."

Must take
care of it
after it is set
out.

The care of the tithes, as to waste or spoiling, after severance, rests upon the parson, and not upon the owner of the land. For it seemeth that the parson is at his peril to take notice of the tithes being set out, and so it hath been declared, that although the parishioner ought *de jure* to reap the corn, yet he is not bound to guard the tithes of the parson (*m*).

And the right to the tithes vests in the parson immediately on severance, so that if he execute a lease of them on a day *subsequent* to their severance, but *previous* to their being carried away by the landholder, the lessee cannot maintain an action for them (*n*).

May spread
and dry it
upon the
ground.

But after the tithes are set forth, he may of common right come himself, or his servants, and spread abroad, dry and stack his corn, hay, or the like, in any convenient place or places upon the ground where the same grew, till it be sufficiently weathered and fit to be carried into the barn. But he must not take a longer time for the doing thereof than what is convenient and necessary, and what shall be deemed a convenient and necessary time the law doth not nor can define, for the quantity of the corn or hay, and the weather, in this case are to be considered; and what shall in this and all other cases of like nature be said to be a reasonable and convenient time, is to be determined by the jury, if the point come in issue triable by a jury; but if it come to be determined upon a demurrer, or other matter of law, the judges of the court where the cause depends are to resolve the same (*o*).

And carry it
away.

And it shall be lawful quietly to take and carry the same away. And if any person carry away his corn or hay, or his other prædial tithes, before the tithe thereof be set forth, or willingly withdraw his tithes of the same, or of such other things whereof prædial tithes ought to be paid; and if any person do stop or let the parson, vicar, proprietor, owner, or

(*m*) Gibs. 689; *Tennant v. Stubbin*,
in the Exchequer, M. 1795; *Ex relat.*
Mri. A. Anstruther.

(*n*) *Wyburd v. Tuck*, 1 Bos. & Pul.
458.

(*o*) Deg. p. 2, c. 14; Str. 245.

other their deputies or farmers, to view, take and carry away their tithes as is above said, he shall forfeit double value with costs, to be recovered in the ecclesiastical courts (*p*).

And he may carry his tithes from the ground where they grew, either by the common way, or any such way as the owner of the land useth to carry away his nine parts. But if there are more ways than one, and the question is, which is the right way, this is cognizable in the temporal court (*q*).

In the case of *Cobb v. Selby* (*r*), it was held, that the parson is not entitled to carry his tithes home by *every* road which the farmer himself uses for the occupation of his farm, but he may use that road which the farmer uses in taking away his nine parts.

And if the owner of the soil, after he hath duly set forth his tithes, will stop up the ways, and not suffer the parson to carry away his tithes, or to spread, dry, and stack them upon the land, this is no good setting forth of his tithes without fraud within the statute; but the parson may have an action upon the said statute, and may recover the treble value, or may have an action upon the case for such disturbance, as it seemeth; or he may, if he will, break open the gate or fence which hinders him, and carry away his tithes (*s*).

But in this he must be cautious that he commit no riot, nor break any gate, rails, lock or hedges, more than necessarily he must for his passage (*t*). But must not do wilful Damage.

And when he comes with his carts, teams, or other carriages, to carry away his tithes, he must not suffer his horses or oxen to eat and depasture the grass growing in the grounds where the tithes arise, much less the corn there growing or cut; but if his cattle (as cannot be avoided) do in their passage, against the will of the drivers, here and there snatch some of the grass, this is excusable (*u*).

It seems, that if tithes set forth remain too long upon the land, the owner of the soil may take them damage feasant, but then, if he be sued for them, in order to justify, he must set forth how long they had remained before he took them; and when they shall be said to remain too long, is triable by the jury (*x*). Penalty on not carrying it away.

Or an action upon the case will lie against the parson for his negligence in his behalf; but no action in such case will lie, unless the parishioner hath duly set forth his tithes, and hath also given notice to the parson that they are so set forth (*y*). Action on the case against the Parson.

But the occupier of the ground cannot put in his cattle and

(*p*) 2 & 3 Edw. 6, c. 13, s. 2.

(*q*) Deg. p. 2, c. 14.

(*r*) 2 Bos. & Pul. N. Rep. 466.

(*s*) Deg. p. 2, c. 14.

(*t*) Ibid.

(*u*) Ibid.

(*x*) Wats. c. 54.

(*y*) Deg. p. 2, c. 14; Lord Raym. 187; 3 Burr. 1892, *supra*. For the grounds of this action, see *Wiseman v. Denham*, 2 Roll. Rep. 328.

destroy the corn or other tithe, for that is to make himself a judge what shall be deemed a convenient time for taking it away; but the court and jury, upon an action brought, are to determine of the reasonableness of the time, and of the recompense to be made for the injury sustained (z).

XVII. *Tithes in London.*

Excepted
from Statutes.

In the several acts of the 27 Hen. 8, c. 20, 32 Hen. 8, c. 7, 2 & 3 Edw. 6, c. 13, 7 & 8 Will. 3, c. 60, and [6 & 7 Will. 4, c. 71, s. 90], there is a proviso that nothing therein shall extend to the city of London, concerning any tithe, offering, or other ecclesiastical duty, grown and due to be paid within the said city, because there is another order made for the payment of tithes and other duties there.

Order by
which they
are governed.

Which order is as followeth:—It appeared by the records of the city of London, that Niger, bishop of London, in the 13 Hen. 3, made a constitution, in confirmation of an ancient custom formerly used time out of mind, that provision should be made for the ministers of London in this manner, that is to say, that he who paid the rent of 20s. for his house wherein he dwelt, should offer every Sunday, and every Apostle's day whereof the evening was fasted, one halfpenny; and he that paid but 10s. rent yearly, should offer but one farthing; all which amounted to the proportion of 2s. 6d. in the pound, for there were fifty-two Sundays, and eight Apostles' days the vigils of which were fasted; and if it chanced that one of the Apostles' days fell upon a Sunday, then there was but one halfpenny or farthing paid, so that sometimes it fell out to be somewhat less than 2s. 6d. in the pound.

And it appears by the book cases in the reign of Edward III. that the provision made for the ministers of London was by offerings and obventions, albeit the particulars are not assigned there, but must be understood according to the former ordinance made by Niger.

And the payment of 2s. 6d. in the pound continuing until the 13 Ric. 2, Arundel, Archbishop of Canterbury, made an explanation of Niger's constitution, and thrust upon the citizens of London two and twenty more saints' days than were intended by the constitution made by Niger, whereby the offerings now amounted unto the sum of 3s. 5d. in the pound. And there being some reluctance by the citizens of London, Pope Innocent, in the 5 Hen. 4, granted his bull, whereby Arundel's explanation was confirmed. Which confirmation (notwithstanding the difference between the ministers and citizens of London about those two and twenty saints' days which were added to their number), Pope Nicholas also, by his bull, did confirm in the 31 Hen. 6.

(z) Lord Raym. 189; *Williams v. Ladner*, 8 Term Rep. 72.

Against which the citizens of London did contend with so high a hand that they caused a record to be made whereby it might appear, in future ages, that the order of explanation made by the Archbishop of Canterbury was done without calling the citizens of London unto it, or any consent given by them: and it was branded by them as an order surreptitiously and abruptly obtained, and therefore more fit to have the name of a destructory than a declaratory order.

Order by
which they
are governed.

Nevertheless, notwithstanding this contention, the payment seemeth to have been most usually made according to the rate of 3s. 5d. in the pound. For Lindwood, who wrote in the time of Henry VI., in his Provincial Constitutions debating the question, whether the merchants and artificers of the city of London ought to pay any tithes, sheweth, that the citizens of London, by an ancient ordinance observed in the said city, are bound, every Lord's-day, and every principal feast-day either of the Apostles or others whose vigils are fasted, to pay one farthing for every 10s. rent that they paid for their houses wherein they dwelt.

And in the 36 Hen. VI. there was a composition made between the citizens of London and the ministers, that a payment should be made by the citizens according to the rate of 3s. 5d. in the pound; and if any house were kept in the proper hand of the owner, or were demised without reservation of any rent, then the churchwardens of the parish where the houses were should set down a rate of the houses, and according to that rate payment should be made.

After which composition so made, there was an act of common council made in the 14 Edw. IV. in London, for the confirmation of the bull granted by Pope Nicholas.

But the citizens of London finding that by the common laws of the realm, no bull of the pope, nor arbitrary composition, nor act of common council, could bind them in such things as concerned their inheritance, they still wrestled with the clergy, and would not condescend to the payment of the said 11d. by the year, obtruded upon them by the addition of the two and twenty saints' days: whereupon there was a submission to the lord chancellor and divers others of the privy council in the time of King Henry VIII.; and they made an order for the payment of tithes according to the rate of 2s. 9d. in the pound; which order was first promulgated by a proclamation made, and afterwards established by an act of parliament made in the 27 Hen. 8, c. 21, intituled "An Act for the Payment of Tithes within the City and Suburbs of London, until another Law and Order shall be made and published for the same (a)."

And ten years after this another law and order was made by the statute of the 37 Hen. 8, c. 12, as followeth: "Where of

(a) Privilegia Londini, 456—8.

Order by
which they
are governed.

late time, contention, strife, and variance hath risen and grown within the city of London and the liberties of the same, between the parsons, vicars, and curates of the said city, and the citizens and inhabitants of the same, for and concerning the payment of tithes, oblations, and other duties within the said city and liberties; for appeasing whereof, a certain order and decree was made thereof, by the most reverend father in God Thomas Archbishop of Canterbury, Thomas Audley, Knight, Lord Audley of Walden, and then Lord Chancellor of England, now deceased, and other of the king's most honourable privy council; and also the king's letters patents and proclamation was made thereof, and directed to the said citizens concerning the same; whereupon it was after enacted in the parliament holden at Westminster by prorogation, the fourth day of February, in the twenty-seventh year of the king's most noble reign, that the citizens and inhabitants of the same city should, at Easter then next following, pay unto the curates of the said city and suburbs, all such and like sums of money, for tithes, oblations, and other duties, as the said citizens and inhabitants by the order of the said late lord chancellor, and other the king's most honourable council, and the king's said proclamation, paid or ought to have paid by force and virtue of the said order at Easter, in the year 1535; and the same payments so to continue from time to time, until such time as any other order or law should be made by the king and the two and thirty persons by the king to be named, as well for the full establishment concerning the payment of all tithes, oblations, and other duties of the inhabitants within the said city, suburbs, and liberties of the same, as for the making of other ecclesiastical laws of this realm of England; and that every person denying to pay as is aforesaid should, by the commandment of the mayor of London for the time being, be committed to prison, there to remain until such time as he should have agreed with the curate for his said tithes, oblations, and other duties as is aforesaid, as in the said act more plainly appeareth; since which act, divers variances, contentions, and strifes are newly arisen and grown between the said parsons, vicars, and curates, and the said citizens and inhabitants, touching the payment of the tithes, oblations, and other duties, by reason of certain words and terms specified in the said order, which are not so plainly and fully set forth as is thought convenient and meet to be; for appeasing whereof, as well the said parsons, vicars, and curates, as the said citizens and inhabitants, have compromitted and put themselves to stand to such order and decree touching the premises as shall be made by the said right reverend father in God and the several other persons hereunder mentioned, for a final end and conclusion to be had and made touching the premises for ever: And to the intent to have a full peace and perfect end between the said parties, their heirs and successors, touching the said tithes, oblations,

and other duties for ever, it is enacted, that such end, order, and direction as shall be made by the forenamed archbishop and the several other persons as aforesaid, or any six of them, before the first day of March next ensuing, concerning the payment of tithes, oblations, and other duties within the said city and the liberties thereof, and inrolled of record in the High Court of Chancery, shall stand, remain, and be as an act of parliament, and shall bind as well all citizens and inhabitants of the said city and liberties for the time being, as the said parsons, vicars, curates, and their successors for ever, according to the effect, purport, and intent of the said order and decree so to be made and inrolled; and that every person denying to pay any of his tithes, oblations, or other duties, contrary to the said decree so to be made, shall by the commandment of the mayor of London for the time being, and in his default or negligence by the lord chancellor of England for the time being, be committed to prison, there to remain till such time as he hath agreed with the curate for the same."

Order by
which they
are governed.

Which decree made in pursuance hereof is as followeth;
viz. :—

"1. As touching the payment of tithes in the city of London, and the liberties of the same: It is fully ordered and decreed by the most reverend father in God Thomas Archbishop of Canterbury, primate and metropolitan of England, Thomas Lord Wrythesly, lord chancellor of England, William Lord St. John, president of his majesty's council and lord great master of his majesty's household, John Lord Russell, lord privy seal, Edward Earl of Hertford, lord great chamberlain of England, John Viscount Lisle, high admiral of England, Richard Lister, knight, chief justice of England, and Roger Cholmely, knight, chief baron of his majesty's exchequer, this twenty-fourth day of February, in the year of our Lord 1545, according to the statute in such case lately provided, that the citizens and inhabitants of the said city and liberties thereof for the time being, shall yearly, without fraud or covin, for ever pay their tithes to the parsons, vicars, and curates of the said city, and their successors for the time being, after the rate hereafter following; that is to wit: Of every 10s. rent by the year, of all houses, shops, warehouses, cellars, stables, and every of them, within the said city and liberty thereof, 16½d.; and of every 20s. rent by the year, 2s. 9d.; and so above the rent of 20s. by the year, ascending from 10s. to 10s., according to the rate aforesaid."

"2. Item, that where any lease is or shall be made of any dwelling-house or houses, shops, warehouses, cellars, or stables, or any of them, by fraud or covin, reserving less rent than hath been accustomed or is; or where any such lease shall be made without any rent reserved upon the same, by reason of any fine or income paid beforehand, or by any other fraud or

Order by
which they
are governed.

covin; in every such case, the tenant or farmer shall pay for his tithes of the same after the rate aforesaid, according to the quality of such rents as the same were last letten for without fraud or covin before the making of such lease.

“3. Item, that every owner or inheritor of any dwelling-house, or houses, shops, warehouses, cellars, or stables, inhabiting or occupying the same himself, shall pay after such rate, according to the quantity of such yearly rent as the same was last letten for, without fraud or covin.

“4. Item, if any person hath taken, or hereafter shall take, any mease or mansion place by lease, and the taker thereof, his executors or assigns, doth or shall inhabit in any part thereof, and hath within eight years last past before this order, or hereafter shall let out the residue of the same; in such case, the principal farmer or farmers, or first taker or takers thereof, their executors or assigns, shall pay their tithes after the rate above-said, according to the quantity of their rent by the year.

“5. And if any person shall take divers mansion houses, shops, warehouses, cellars, or stables in one lease, and shall let out one or more of them, and shall keep one or more in his own hands, and inhabit in the same; the said taker, and his executors or assigns, shall pay their tithes after the rate above-said, according to the quantity of the yearly rent of such mansion houses or house retained in his own hands; and his assignees of the residue of the said mansion house or houses, shall pay their tithes after the rate abovesaid, according to the quantity of their yearly rents.

“6. Item, if such farmer or farmers, or his or their assigns, of any mansion house or houses, warehouses, shops, cellars, or stables, hath at any time within eight years last past, or shall hereafter let over all the said mansion house or houses contained in his or their lease, to one or more persons; the inhabitants, lessees, or occupiers thereof, shall pay their tithes after the rate of such rents as the inhabitants, lessees, or occupiers, and their assigns, have been or shall be charged withal, without fraud or covin.

“7. Item, if any dwelling-house within eight years last past was or hereafter shall be converted into a warehouse, storehouse, or such like; or if a warehouse, storehouse, or such like, within the said eight years was, or hereafter shall be converted into a dwelling-house, the occupiers thereof shall pay tithes for the same after the rate above declared of mansion house rents.

“8. Item, that where any person shall demise any dye-house or brewhouse, with implements convenient and necessary for dyeing or brewing, reserving a rent upon the same, as well in respect of such implements as in respect of such dye-house or brewhouse, the tenant shall pay his tithes after such rate as is abovesaid, the third penny abated; and every prin-

Order by
which they
are governed.

cipal house or houses, with key or wharf, having any crane or gibet belonging to the same, shall pay after the like rate of their rents as is aforesaid, the third penny abated; and the other wharfs belonging to houses having no crane or gibet, shall pay for tithes as shall be paid for mansion houses in form aforesaid.

“ 9. Item, that where any mansion house with a shop, stable, warehouse, wharf with crane, timber yard, teinter yard, or garden belonging to the same, or as parcel of the same, is or shall be occupied together, if the same be hereafter severed or divided, or at any time within eight years last past were severed or divided, then the farmers or occupiers thereof shall pay such tithes as is abovesaid for such shops, stable, warehouses, wharf with crane, timber yard, teinter yard, or garden aforesaid, so severed or divided, after the rate of their several rents thereupon reserved.

“ 10. Item, that the said citizens and inhabitants shall pay their tithes quarterly, that is to say, at the feast of Easter, the nativity of St. John the Baptist, the feast of St. Michael the Archangel, and the nativity of our Lord, by even portions.

“ 11. Item, that every householder paying 10s. rent or above, shall for him or herself be discharged of their four offering days; but his wife, children, servants, or others of their family, taking the rights of the church at Easter, shall pay 2d. for their four offering days yearly.

“ 12. Provided always, and it is decreed, that if any house which hath been or hereafter shall be letten for 10s. rent by the year, or more, be or hath been at any time within eight years last past, or hereafter shall be divided and leased into small parcels or members, yielding less yearly rent than 10s. by the year, the owner, if he shall dwell in any part of such house, or else the principal lessee (if the owner do not dwell in some part of the same) shall pay for the tithes after such rate of rent as the same house was accustomed to be letten for before such division or dividing into parts or members; and the under-farmers and lessees to be discharged of all tithes for such small parcels, parts or members, rented at less yearly rent than 10s. by the year without fraud or covin, paying 2d. yearly for four offering days.

“ 13. Provided always, and it is decreed, that for such gardens as appertain not to any mansion house, and which any person holdeth in his hands for pleasure, or to his own use, the person holding the same shall pay no tithes for the same. But if any person which shall hold any such garden, containing half an acre or more, shall make any yearly profit thereof, by way of sale, he shall pay tithes for the same after such rate of his rent as is herein first above specified.

“ 14. Provided also, that if any such gardens now being of the quantity of half an acre or more, be hereafter by fraud or

Order by
which they
are governed.

covin divided into less quantities, then to pay according to the rate abovesaid.

“ 15. Provided always, that this decree shall not extend to the houses of great men, or noblemen, or noblewomen, kept in their own hands, and not letten for any rent, which in times past have paid no tithes, so long as they shall so continue unletten; nor to any halls of crafts or companies, so long as they be kept unletten, so that the same halls in times past have not used to pay any tithes.

“ 16. Provided always, and it is decreed, that this present order and decree shall not in any wise extend to bind or charge any sheds, stables, cellar, timber yards, nor teinter yards, which were never parcel of any dwelling-house, nor belonging to any dwelling-house, nor have been accustomed to pay any tithes; but that the said citizens and inhabitants shall thereof be quit of payment of any tithes, as it hath been used and accustomed.

“ 17. Provided also, and it is decreed, that where less sum than $16\frac{1}{2}d.$ in the 10s. rent, or less sum than $2s. 9d.$ in the 20s. rent, hath been accustomed to be paid for tithes; in such places the said citizens and inhabitants shall pay but only after such rate as hath been accustomed.

“ 18. Item, it is also decreed, that if any variance, controversy or strife shall arise in the said city for nonpayment of any tithes; or if any variance or doubt shall arise upon the true knowledge or division of any rent or tithes within the liberties of the said city, or of any extent or assessment thereof; or if any doubt arise upon any other thing contained within this decree; then, upon complaint made by the party grieved to the mayor of the city of London for the time being, the said mayor, by the advice of counsel, shall call the parties before him, and make a final end of the same, with costs to be awarded by the discretion of the said mayor and his assistants, according to the intent and purport of this present decree.

“ 19. And if the mayor shall not make an end thereof within two months after complaint to him made, or if any of the said parties find themselves aggrieved, the lord chancellor of England for the time being, upon complaint to him made within three months then next following, shall make an end in the same, with such costs to be awarded as shall be thought convenient, according to the intent and purport of the said decree.

“ 20. Provided always, that if any person take any tene-ment for a less rent than it was accustomed to be letten for, by reason of great ruin or decay, burning, or such like occasions or misfortunes, such person, his executors or assigns, shall pay tithes only after the rate of the rent reserved in his lease, and none otherwise, as long as the same lease shall endure.”

Of every 10s. Rent by the Year.—It was resolved, in the

Cases under
this Order.

case of *Dr. Meadhouse v. Dr. Taylor*, that a rent for half a year, and afterwards for another half year, is a yearly rent, or a rent by the year, within the meaning of this decree (b). Cases under this Order.

Of all Houses.]—In the case of *Green v. Piper*, E., 34 Eliz. (c) it was suggested, in order to hinder the granting of a consultation, that the house belonged to a priory which was discharged of tithes by bull. But the court replied, that by the common law houses paid no tithes; and the right in the present case subsisting immediately upon this statute, which lays them upon every house, no exemption shall be allowed, but to such houses as are specially exempted by the statute itself.

By reason of any Fine or Income paid beforehand, or by any other Fraud or Covin.]—M., 5 Jac. 1, *Skidmore and Eire* plaintiffs, in a prohibition against *Bell*, parson of St. Michael Queenhithe in London (d). The case was this: The said parson libelled before the chancellor of London for the tithes of a house called the Boar's Head, in Bread-street, in the said parish, the ancient farm rent whereof was 5*l.* at the time of the said decree and after; and that of late a new lease was made of the said house, rendering the rent of 5*l.* a year, and over that a great income or fine, which was covenanted and agreed to be paid yearly at the same day; that the rent was paid as a sum in gross, and that so much rent might have been reserved for the said house, as the rent reserved and the sum in gross amounted unto; which reservation and covenant were made to defraud the said parson of the tithes of the true rent of the said house, which to him did appertain by the purport and true intention of the said decree. And in this case four points were resolved by the court. 1. If so much rent be reserved as was accustomed to be paid at the making of the said decree (whatsoever fine or income be paid), that the parson can aver no covin; for the words of the decree be, "Where any lease is or shall be made of any dwelling-house by fraud or covin, in reserving less rent than hath been accustomed:" so as if the accustomed rent be reserved, no fraud can be alleged; for the fraud by the decree is, when lesser rent than was then accustomed to be paid is reserved, or if no rent at all be reserved, for then tithe shall be paid according to the rent that then was last before reserved to be paid. So as the decree consisteth upon four points; first, where the accustomed rent was reserved; secondly, where the rent was increased, there the tithes should be paid according to the whole rent; thirdly, where lesser rent was reserved; and fourthly, where no rent was reserved, but had been formerly reserved. And this act and decree were very beneficial for the clergy of London, in respect of that which they had before. And the defendant in his libel confesseth that the accustomed rent was reserved, and

(b) Noy, 130.

(c) Cro. Eliz. 279.

(d) 2 Inst. 660.

Order by
which they
are governed.

therefore no cause of suit. 2. It was resolved, that as to such houses as were never letten to farm, but inhabited by the owner, this is *casus omissus*, and shall pay no tithes by force of the decree. 3. It was resolved, that where the decree saith, "Where no rent is reserved by reason of any fine or income paid beforehand," albeit no fine or income be paid in that case; yet if no rent be reserved, the parson shall have his tithes according to the decree; for that is put but for an example or cause why no rent is reserved; and whether any fine or income were paid or no, is not material as to the parson. 4. It was resolved, that the parson could not sue for the said tithes in the ecclesiastical court; for that the act and decree that raised and gave these kind of tithes, did limit and appoint how and before whom the same should be sued for, and did appoint new and special judges to hear and determine the same. And in the end it was awarded that the prohibition should stand.

Antrobus v. The East India Company (e). This bill was filed by the plaintiff, under the decree and stat. 37 Hen. 8, c. 12, for the payment of tithes at the rate of 2s. 9d. in the pound upon the annual *value* of premises, consisting of extensive warehouses, lately erected by the East India Company, and used by them in the course of their trade. The warehouses were erected upon the site of some small tenements, some of which appeared by the answer to have been formerly occupied at low rents: as to the others, the ancient rents were not known. The answer did not state any specific customary payment in lieu of tithes; but alleged generally, that some less sums than 2s. 9d. in the pound had been paid. The defendants insisted, that the payment, according to the statute, could be only upon such of the old rents as were ascertained; and that nothing was to be paid in respect to those premises, the ancient rents of which were not known: and they contended, that an issue ought to be directed, which was opposed by the plaintiff, on the ground, that no specific customary payment being set up, no foundation was laid for an issue. The master of the rolls decreed for payment at the rate of 2s. 9d. in the pound upon the *value*, and directed a reference to the master accordingly.

Upon Complaint made.]—In the aforesaid case of *Dr. Meadhouse v. Dr. Taylor (f)*, it was held by the court, that the complaint ought to be in writing (and not by word of mouth only), in the nature of a *monstrans de droit* declaring all the title.

To the Mayor.]—Pursuant to the aforesaid case of *Skidmore v. Eire (g)*, divers prohibitions have been granted (when tithes were sued for upon this statute) to the ecclesiastical court. But when it was pleaded, in the year 1658, that the

(e) 13 Ves. 9.

(f) Noy, 130.

(g) Gibs. 1223.

right of tithes, upon the foundation of this act, could not be cognizable in the exchequer, by reason of the provision therein made for determining of all controversies before the lord mayor or lord chancellor; it was held clearly by the barons, that the court of exchequer had jurisdiction in the cause, because the act had no negative words in it. — Upon which Dr. Gibson shrewdly observes, that if affirmative words will not exclude the temporal court, it may be hard to find a good reason, why (according to the foregoing judgments) they should exclude the spiritual court.

Cases under this Order.

After all, notwithstanding this settlement by the aforesaid decree, divers prescriptions for the payment of lesser rates than the parsons might require by the said settlement (as to pay 10s. for the tithe of an house, although the rent thereof was 40*l.* a year or more) have been gained and allowed (*h*). But upon the occasion of the fire in London, in the year 1666, as to the churches and houses thereby consumed, another statute was made, namely, the 22 & 23 Car. 2, c. 15, which is as followeth: "Whereas the tithes in the city of London were levied and paid with great inequality, and are, since the late dreadful fire there, in the rebuilding of the same, by taking away of some houses, altering the foundations of many, and the new erecting of others, so disordered, that in case they should not for the time to come be reduced to a certainty, many controversies and suits of law might thence arise: it is therefore enacted, that the annual certain tithes of the parishes within the said city and liberties thereof, whose churches have been demolished, or in part consumed by the late fire, and which said parishes, by virtue of an act of this present parliament, remain and continue single as heretofore they were, or are, by the said act annexed or united into one parish respectively, shall be as followeth; that is to say, the annual certain tithes, or sum of money in lieu of tithes."

Churches united after the Fire of London are entitled to an Annual Sum of Money.

	£.	s.
Sect. 2.—"1. Of the parish of Allhallows Lombard Street	110	0
2. Of St. Bartholomew Exchange (<i>i</i>).....	100	0
3. Of St. Bridget, <i>alias</i> Brides	120	0
4. Of St. Bennet Fink (<i>k</i>)	100	0
5. Of St. Michael Crooked Lane (<i>l</i>).....	100	0

(*h*) These are confirmed by sect. 17 of the decree. See *Bennet v. Treppas*, Gilb. Eq. R. 191; 8 Vin. Ab. 568; Bunb. 106; 2 Bro. P. C. 439.

(*i*) [Has been lately pulled down (by "London Bridge Approaches Act," 2 & 3 Vict. c. 107 (local act); see ss. 74 to 102; and united to St. Margaret Lothbury (12) and St. Christopher le Stocks (6).]

(*k*) [The tower has been lately pulled down (by the "Act for Building the New Royal Exchange"), and the body is threatened with a similar fate.]

(*l*) [Has been lately pulled down (by the Act of Parliament for the New London Bridge), and parish united to St. Magnus the Martyr (31).]

Churches
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of Money.

	£.	s.
6. Of St. Christopher le Stocks	120	0
7. Of St. Dionis Back-church.....	120	0
8. Of St. Dunstan in the East	200	0
9. Of St. James Garlick-hythe	100	0
10. Of St. Michael Cornhill.....	140	0
11. Of St. Michael Bassishaw	132	11
12. Of St. Margaret Lothbury.....	100	0
13. Of St. Mary Aldermanbury	150	0
14. Of St. Martin Ludgate	160	0
15. Of St. Peter Cornhill	110	0
16. Of St. Stephen Coleman Street.....	110	0
17. Of St. Sepulchre.....	200	0
18. Of Allhallows Bread Street, and St. John Evangelist.....	140	0
19. Of Allhallows the Great, and Allhallows the Less	200	0
20. Of St. Alban Wood Street, and St. Olaves Silver Street.....	170	0
21. Of St. Anne and Agnes, and St. John Zachary	140	0
22. Of St. Augustine, and St. Faith	172	0
23. Of St. Andrew Wardrobe, and St. Anne Blackfriars	140	0
24. Of St. Antholin, and St. John Baptist ..	120	0
25. Of St. Bennet Grace-church, and St. Leonard Eastcheap	140	0
26. Of St. Bennet Pauls-wharf, and St. Peter Pauls-wharf	100	0
27. Of Christ Church, and St. Leonard Fos- ter Lane	200	0
28. Of St. Edmund the King, and St. Nicholas Acons	180	0
29. Of St. George Botolph Lane, and St. Botolph Billingsgate	180	0
30. Of St. Laurence Jury, and St. Magdalen Milk Street	120	0
31. Of St. Magnus, and St. Margaret New Fish Street	170	0
32. Of St. Michael Royal, and St. Martin Vintry	140	0
33. Of St. Matthew Friday Street, and St. Peter Cheap	150	0
34. Of St. Margaret Pattens, and St. Gabriel Fenchurch	120	0
35. Of St. Mary at Hill, and St. Andrew Hubbard	120	0
36. Of St. Mary Woolnorth, and St. Mary Woolchurch	160	0
37. Of St. Clement Eastcheap, and St. Mar- tin Orgars.....	140	0
38. Of St. Mary Ab-church, and St. Law- rence Pountney	120	0

	£.	s.	Churches united after the Fire of London are entitled to an Annual Sum of Money.
39. Of St. Mary Aldermary, and St. Thomas Apostle	150	0	
40. Of St. Mary le Bow, St. Pancras Super Lane, and Allhallows Honey Lane..	200	0	
41. Of St. Mildred Poultry, and St. Mary Cole-church	170	0	
42. Of St. Michael Wood Street, and St. Mary Staining	100	0	
43. Of St. Mildred Bread Street, and St. Margaret Moses	130	0	
44. Of St. Michael Queenhyth, and Trinity..	160	0	
45. Of St. Magdalen Old Fish Street, and St. Gregory	120	0	
46. Of St. Mary Somerset and St. Mary Mountshaw	110	0	
47. Of St. Nicholas Coleabby, and St. Nicholas Olaves	130	0	
48. Of St. Olave Jewry, and St. Martin Ironmonger Lane.....	120	0	
49. Of St. Stephen Walbrook, and St. Bennet Sheerhog	100	0	
50. Of St. Swythin, and St. Mary Bothaw..	140	0	
51. Of St. Vedast, <i>alias</i> Foster's, and St. Michael Quern	160	0	

Sect. 3. "Which respective sums of money to be paid in lieu of tithes within the said respective parishes, and assessed as hereinafter is directed, shall be the respective certain annual maintenance (over and above glebes and perquisites, gifts and bequests to the respective parson, vicar and curate of any parish for the time being, or to their successors respectively, or to others for their use) of the said respective parsons, vicars and curates who shall be legally instituted, inducted and admitted into the respective parishes aforesaid."

And by sects. 4, 5, 6, 7, for the more equal levying of the same upon the several houses, buildings and other hereditaments within the respective parishes, assessments were ordered to be made before July 24, 1671, "upon all houses, shops, warehouses and cellars, wharfs, quays, cranes, water-houses, tofts of ground (remaining unbuilt), and all other hereditaments whatsoever (except parsonage or vicarage houses), the whole respective sum by this act appointed, or so much of it as is more than what each impropiator is by this act enjoined to allow."

Sect. 8. "And three transcripts of the assessments were to be made; one to be deposited amongst the records of the city, another in the registry of the bishop of London, and another in the parish vestry respectively, for a perpetual memorial thereof."

Sect. 9. "The sums assessed to be paid to the respective parsons, vicars and curates, at the four most usual feasts, to

Churches
united after
the Fire of
London are
entitled to an
Annual Sum
of Money.

wit, at the annunciation of the blessed Virgin, the nativity of St. John Baptist, the feast of St. Michael the Archangel, and the nativity of our blessed Saviour, or within fourteen days after each of the feasts aforesaid, by equal payments; the respective payments thereof to begin and commence only from such time as the incumbent shall begin to officiate or preach as incumbent."

Sect. 10. "Impropriators shall pay what *bonâ fide* they have used and ought to pay to the respective incumbents at any time before the said late fire; the same to be computed as part of the maintenance of such incumbent."

Sect. 11. "And if any inhabitant shall refuse or neglect to pay to the incumbent the sum appointed by him to be paid (the same being lawfully demanded upon the premises); it shall be lawful for the lord mayor, upon oath to be made before him of such refusal or neglect, to grant out warrants for the officer or person appointed to collect the same, with the assistance of a constable in the day time, to levy the same by distress and sale of the goods of the party so refusing or neglecting; restoring to the owner the overplus over and above the said arrears and the reasonable charges of making such distress."

Sect. 12. "And if the lord mayor shall refuse or neglect to execute any of the powers to him given by this act, it shall be lawful for the lord chancellor or lord keeper, or two or more of the barons of the exchequer, by warrant under their hands and seals respectively, to do and perform what the said lord mayor might or ought to have done in the premises."

Sect. 14. "Provided, that no court or judge, ecclesiastical or temporal, shall hold plea of or for any the sum or sums of money due and owing or to be paid by virtue of this act; other than the persons hereby authorized to have cognizance thereof: nor shall it be lawful to or for any parson, vicar, curate or incumbent, to convent or sue any person assessed as aforesaid and refusing or neglecting to pay the same in any court or courts, or before any judge or judges, other than what are authorized and appointed by this act, for the hearing and determining of the same, in manner aforesaid."

Sect. 15. "Provided also, that it shall be lawful for the warden and minor canons of St. Paul's, parson and proprietors of the rectory of the parish of St. Gregory aforesaid, to receive and enjoy all tithes, oblations and duties arising or growing due within the said parish, in as large and beneficial manner, as formerly they have or lawfully might have done."

In the case, *Ex parte Savage*, rector of the united parishes of St. Andrew, Wardrobe, and St. Anne, Blackfriars, and *Ex parte Wood*, rector of St. Michael Royal and St. Martin Vintry (*m*), which came before Lord Harcourt on petition, Oct. 29, 1713, setting forth, that the petitioners had respec-

(*m*) 3 Atk. 639.

tively demanded of the inhabitants the respective rates and arrears for the houses in their respective occupations, but they refused to pay the same, and that the petitioners applied to Sir Richard Hoare, lord mayor, for such warrants as the act of parliament directed him to grant for levying the said money, and he refused to grant such warrants; wherefore it was prayed that his lordship would grant the petitioners his warrant to levy the several sums of money so respectively due to them, by distress and sale of the goods of the defaulters. Lord Harcourt, thinking the matter of great consequence to the London clergy in general, as no such complaint since the making of the act had been before made to the lord chancellor, or lord keeper of the great seal, or to any two of the barons of the exchequer, desired the assistance of Mr. Baron Bury, and Mr. Baron Price; and on the 2d December following it came on again in their presence, when it appeared that several of the quarterly sums claimed by the petitioners became due and in arrear when the houses stood empty, or were in the possession of former tenants or occupiers thereof; and a question thereupon arising, whether such sums so assessed upon the several houses, for making up certain annual sums of money to be paid in lieu of tithes, were become a fixed or real charge upon the houses whereon they had been so assessed, so that the arrears which became due in the time of former tenants, or when the houses were empty, might be levied on the succeeding tenants; the further consideration of the petitions was adjourned to December 23, upon which day the two barons certified their opinion, that by the statute the sums assessed on the several houses are become real charges upon the houses, so that the arrears which ought to have been paid by the former occupiers, or which became due when the houses stood empty, may be levied by distress and sale of the goods of the present occupiers: and Lord Harcourt declared he entirely concurred in opinion with the barons, and that the petitioners were at liberty to apply to him for warrants of distresses, as prayed by their petition.

Churches united after the Fire of London are entitled to an Annual Sum of Money.

And in the case, *Ex parte Croxall*, minister of the united parishes of St. Mary, Somerset and St. Mary Mountshaw, April 25, 1748 (n), where the lord mayor had heard the parties, and was of opinion not to grant the warrant, and thereupon it was urged that the lord mayor's determination was final, and nothing further could be done; Lord Hardwicke said, that the lord mayor's determination is final only in cases of appeal brought before him, but here the only act he has to do is to issue his warrant, which having refused to do, the lord chancellor held that he had jurisdiction to inquire whether the lord mayor had done right in refusing the warrant, and if of opinion the

(n) 3 Atk. 639.

Churches
united after
the Fire of
London are
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Annual Sum
of Money.

lord mayor had done wrong, he could then issue his own warrant for levying the assessment.

In the case of *The Warden and Minor Canons of St. Paul's v. Morris* (o), the bill filed by the plaintiffs stated their title, as parson and proprietors of the church of St. Gregory, under letters patent, 24th Hen. 6, to all tithes, &c. within the said parish. It stated also the decree, made on the 23d February, 1545, in pursuance of the statute 37 Hen. 8, c. 12, by which it was ordered, that the inhabitants of London should pay tithes at the rate of 2s. 9d. in the pound. The bill further stated the act of parliament 22 Cha. 2, c. 11, for rebuilding the city of London, by which the parishes of St. Mary Magdalen, Old Fish Street, and St. Gregory were united, and the act 22 & 23 Cha. 2, c. 15, by which the tithes of those two parishes were fixed at 120l., *both those acts saving expressly the right of the plaintiffs to the tithes of the parish of St. Gregory*; and the bill prayed an account of the tithes due from the defendants, occupiers of houses within the said parish. After two trials at bar in favour of the claim of the plaintiffs to tithes at 2s. 9d. in the pound, upon an issue whether any and what less sum had been paid, a motion was made for a new trial on the ground that evidence had been improperly rejected. The court refused to grant a new trial, being of opinion that the evidence offered on the part of the defendants, though proving that a less sum than 2s. 9d. in the pound had been paid, did not show any *certain* payment in lieu of tithes.

Customary
Tithes for
Houses not
in London.

In some places, particularly in the neighboured of London, though not within the city, and therefore not within the 37 Hen. 8, a sum of money is paid for each house, in the nature of a *modus decimandi* (p). In *Pocock v. Titmarsh* (q), it appeared that this payment, which was 12s. per house, was the only provision for the vicar of St. Saviour's Southwark; and the court decreed an account without directing an issue.

Case of
Beresford
v.
Newton.

[The most important and latest case on this subject is *Beresford v. Newton and others* (r): in this case a bill was filed by the plaintiff, the rector of St. Andrew, Holborn (in the Court of Exchequer), to enforce certain ancient customary payments in respect of certain houses occupied in that part of the parish of St. Andrew, Holborn, which is within the county of Middlesex (s).

[Lord Abinger, C. B.—“The first question to be decided is,

(o) 9 Ves. 155.

(p) See Hobart, 10, and *Dr. Grant's case*, 11 Rep. 15.

(q) Bunb. 102.

(r) [1 Crom., M. & R. 901; 5 Tyrrwh. 441.]

(s) [The cases cited were *Umfreville v. Hodges*, 1 E. & Y. 553; *Umfreville v. Topping*, 2 E. & Y. 184;

Umfreville v. Campion, 1 E. & Y. 590; *Kynaston v. Hattersley*, 2 E. & Y. 183; *Kynaston v. Hawley*, 3 Wood, 135; *Heath v. Sanford and another*, 1 Wood, 427; *Dr. Grant's case*, 11 Ca. 15; 1 E. & Y. 222; and others not reported from the Decree Book.—Ed.]

whether or not, under the circumstances stated, there is ground for us to infer, that by custom existing from time immemorial, these payments were made to the incumbent of St. Andrew's, Holborn, by the respective occupiers of the houses described in the bill. Upon that point I have personally no doubt that sufficient ground appears to justify that inference. The evidence shows that for more than 100 years the occupiers of these houses have made these customary payments. Now, though it would be a question for a jury to say whether an usage of that duration, standing alone without explanation, or contradiction by other facts, was or was not immemorial, I cannot presume that they would do otherwise than draw the true inference from that state of evidence, viz. that the usage was immemorial. As to the second question, whether such payments could have had a legal origin, we should be doing great violence to the many decisions which have established payments of this description to be legal, if we were now to overturn them all because we cannot with certainty point out a legal origin for them. Surely it is the duty of courts of justice rather to endeavour to find out grounds for supporting a long series of former decisions, than to try to discover new lights in order to overturn them. I should say, that after repeated decisions of the competent tribunals on a particular subject-matter which has remained unimpeached for many years, and as such have afforded foundation for usage resting upon them, courts of justice can hardly be called on to suggest any legal origin for the payments which have been so often upheld by their decrees. The decisions themselves afford sufficient grounds for our judgment (*t*); however, if called upon to suggest a legal origin for these payments, I think, first, that we may resort to any reasonable intendment in support of them; and, next, that there are several ways in which they may legally have originated. First, it is provided generally by 27 Hen. 8, c. 20, that all tithes should be paid according to the ecclesiastical laws and ordinances of the Church of England, and after the laudable usages and customs of the parish or place where the party dwelt. Stat. 2 & 3 Edw. 6, c. 13, next introduced several variations and useful modifications in the laws of tithes, providing, among others, by s. 7, 'that every person exercising merchandizes, bargaining and selling clothing, handicraft, or other art or faculty, being such kind of persons and in such places as heretofore within these forty years have accustomably used to pay such personal tithes, or of right ought to pay (other than such as have been day labourers) shall yearly, at or before the feast of Easter, pay for his personal tithes,' &c. The expression, 'have accustomably been used to pay,' is applicable to all cases where personal tithes had been paid. The 11th

(*t*) [See Ambler, 10, 11; Prec. in Ch. 461; Hargrave's Co. Lit. 145 to Co. Lit. 24 *b*.]

Case of
Beresford
v.
Newton.

section sanctions the payment of the customary tithe of fish, and speaks of the parish. The 12th section speaks of the payment by the inhabitants of London and Canterbury, and the suburbs of the same: 'Provided always, and be it enacted by the authority aforesaid, that this act, or any thing herein contained, &c., shall not extend in anywise to the inhabitants of the cities of London and Canterbury, and suburbs of same, nor to any other town or place that hath used to pay their tithes by their houses, otherwise than they ought or should have done before the making of this act.' Now suppose that before the making of that act an agreement had been made in fact, whether exactly grounded on the existing law or not, that certain houses in the suburbs of the city of London, viz. in the parish here spoken of, St. Andrew's, Holborn, should pay certain specific sums for their tithes, and that all the other houses in that suburb and part of the parish should be discharged. And suppose that agreement to have been acted upon for forty years, would not the effect of this statute be to confirm the payment so stipulated for? Suppose, first, that it had no legal origin, and that it had been acted on for 40, 50, or 100 years—suppose, as we are at liberty to do, that the whole of this parish which is situate out of the city of London had been in the hands of one or two persons, who, while there were only a few houses built, had made a bargain with the incumbent or proper authorities for the time being, that in consideration of certain houses then existing within the parish, paying certain specific sums, which we will suppose of much larger amount than they would be liable to pay upon any footing of a tithe applicable to them or their sites, that then any new inhabitants who might come to reside in new houses afterwards to be built as the population might increase, should be exempted from personal tithes (not from prædial tithes as long as the land should be cultivated). Then if that bargain had been acted upon for 40 years, the result would be, that this statute would apply to it, and the occupiers of those newly-built houses would have the benefit of exemption from all personal tithes within that district, which had been before accustomed to pay personal tithes, by reason of the owners of the houses then existing having submitted to a much larger payment than those houses on their sites would otherwise have been liable to pay? I think we need not look to the origin of the transaction, if, in point of fact, it might have existed 40 years before the passing of the statute of Edw. 6. If it had existed so long, then the statute has the effect of declaring that parties shall not pay personal tithes if they have not paid them for the last 40 years; but if they have been accustomed to pay personal tithes, they shall continue to do so. I quite agree that a house, *quâ* house, is not liable to pay tithes at all; but I should go further. I can suggest a case where such a com-

position would be perfectly good. Suppose an owner of land, paying prædial tithes for it, to intend to cover it with buildings, in which state no tithes are payable for it, but during the progress of the building, the part not covered is liable to pay tithes for such matters as it produces; is there any thing unreasonable in the owner of that land saying to the rector, patron, and ordinary, 'I am now going to dedicate my lands to purposes which in the event will probably destroy all your tithes; but I offer to enter into this arrangement with you: if you will take for the first eight or ten houses that I build, one fixed and specific payment, according to the different annual value of the houses, and exonerate the remainder of the land from tithes so long as it remains unbuilt on, those payments shall be made to you perpetually, as long as those houses are occupied?' Sir Charles Wetherell has asked, with great ingenuity, what becomes of the *modus* when the houses have ceased to be occupied, and where is the consideration for it? The answer is, that when all the rest of the land is built on, *ex hypothesi*, the incumbent would be entitled to no tithes at all for it, and therefore would not make a bad bargain in taking the chance of those payments from the existing houses during all the time they were occupied in lieu of all the tithes claimed for their sites, and as a perpetual payment in lieu of the prædial tithes, which, should the rest of the land be subsequently built on, he could not afterwards claim. If the houses were all burnt, then the foundation of the argument is gone; if the land goes back into a state of cultivation, the original right to prædial tithes or small tithes is revived. So long as the land is covered with the buildings, so that the incumbent can get no tithes from it, he has made a good bargain. I suggest that is the origin of a custom, that as long as certain houses were occupied, the incumbent should take a specific payment for those houses in exoneration of all the rest. I consider that to be a good *modus*. Supposing I prove the fact of payment to have existed in proper time, and the agreement might have been made by competent parties, I do not see any objection to it in point of law. Without affirming that such was the fact, I suggest a possible case which occurred to me in regard to this sort of payment; and if any possible case can be suggested, the court is bound to adopt it, in order to support payments that have been allowed above one hundred years, and sanctioned by so many decisions of courts of justice, especially of this court. I remember arguing a question before Lord Kenyon respecting the origin of a usage of 60 or 70 years, and his lordship emphatically said, 'I will presume an act of parliament to sanction the usage of 100 years (*u*).' However strong that presumption

(*u*) [See *Eldridge v. Knott*, Cowp. *Fanshaw v. Rotheram*, 1 Eden's Ch. 214; *Bealey v. Shaw*, 6 East, 215; Cas. 296; *Chalmer v. Bradley*, 1 Jac. Rex v. *Montague*, 4 B. & C. 588; & W. 63.]

*Case of
Beresford
v.
Newton.*

may be, it shows his strong opinion as to how far a court would go to sanction an existing usage; and when I recollect how many various rights of property must depend on usage, and consider that in this instance we are asked to disturb a settled and existing right which has lasted for a century, I think it is not too much to resort to and adopt any possible suggestion for the purpose of supporting it. It appears to me that I have suggested in this case two states of things very likely to have occurred to sanction the usage; others, which might equally sanction, may have in fact occasioned it. I think, therefore, we may presume a legal origin to it. Whether these payments are called a composition or modus for tithes, or by any other name, they appear to be ancient, and I think that enough is shewn to give us the right to presume that they have been made from time immemorial for these particular houses, or for houses preceding them on the same sites. We ought therefore to sustain them (x).”—ED.]

For the stipends of the ministers of the fifty new churches, provision is made by the several acts of parliament relating thereunto, to be raised from the duties on coals.

There are moreover several particular statutes for particular churches, in London and elsewhere.

After all, these pecuniary compensations, however reasonable at first, must in process of time become insufficient, as the value of money decreaseth. And this hath been the case of all moduses; which at the time of their commencement were the real value of the tithes. On the other hand, it must be acknowledged, that the payment of tithes in kind is in many respects troublesome and inconvenient. If a method could be established, that the minister should receive an equivalent durable, and not liable to diminution by the fluctuation of money, the people generally would be desirous to purchase their tithes at the highest supposable estimation; which if employed in a purchase of land, the value thereof would continue in proportion as the tithes would have done, forasmuch as the annual rent of the land will always be according to its produce.

XVIII. *Leases of Tithes (y).*

6 & 7 Will.
4, c. 71.

[The 6 & 7 Will. 4, c. 71, contains the following provisions with respect to leases of tithes, giving a definition of words used in the act: it enacts by sect. 12,

Meaning of
the Words
“Person,”

[“That in the construction and for the purposes of this act, unless there be something in the subject or context repugnant to

(x) [Parke, B., Bolland, B., and Alderson, B., agreed.]

(y) [As to leases of tithes which had been renewed, being subject to

previous trusts, see *Webb v. Lugur*, 2 Y. & C. 247. As to conveyances of tithes, see Shelford on the Tithe Commutation Acts, p. 19.—ED.]

such construction, the word 'person' shall mean and include the king's majesty, and any body corporate, aggregate, or sole, as well as an individual; and any word importing the singular number only, shall mean and include several persons or parties as well as one person or party, and several things as well as one thing respectively, and the converse; and any word importing the masculine gender only, shall mean and include a female as well as a male; and the word 'lands' shall mean and include all messuages, lands, tenements, and hereditaments; and the word 'tithes' shall mean and include all uncommuted tithes, portions and parcels of tithes, and all moduses, compositions real, and prescriptive and customary payments; and the word 'parish' and 'parochial' shall mean and include, and extend to every parish and every extra-parochial place, and every township or village, within which overseers of the poor are separately appointed under the provisions of an act passed in the thirteenth and fourteenth years of the reign of his late majesty King Charles the Second, intituled, 'An Act for the better Relief of the Poor of this Kingdom,' and every district of which the tithes are payable under a separate impropriation or appropriation, or in a separate portion or parcel, or which the commissioners shall by any order direct to be considered as a separate district for the commutation of tithes; and the words 'land owner' or 'tithe owner,' or 'owner of lands' or 'owner of tithes,' shall mean and include every person who shall be in the actual possession or receipt of the rents or profits of any lands or tithes (except any tenant for life or lives, or for years, holding under a lease or agreement for a lease on which a rent of not less than two thirds of the clear yearly value of the premises comprised therein shall have been reserved, and except any tenant for years whatsoever holding under a lease or agreement for a lease for a term which shall not have exceeded fourteen years from the commencement thereof,) and that without regard to the real amount of interest of such person; and in every case in which any tithes or lands shall have been leased or agreed to be leased to any person for life or lives, or for years, by any lease or agreement for a lease on which a rent less than two-thirds of the clear yearly value of the premises comprised therein shall have been reserved, and of which the term shall have exceeded fourteen years from the commencement thereof, the person who shall for the time being be in the actual receipt of the rent reserved upon such lease or agreement for a lease shall, jointly with the person who shall be liable to the payment of such rent of such tithes or lands, be deemed for the purposes of this act to be the owner of such tithes or lands; and in every case in which any person shall be in possession or receipt of the rents or profits of any tithes or lands under any sequestration, extent, elegit, or other writ of execution, or as a receiver under any order of a court of equity, the person against whom such writ shall have issued, or who but for such order would have been in possession, shall jointly with the person in possession by virtue of such writ or order, be deemed for the purposes of this act to be the owner of such tithes or lands."

"Lands,"
"Tithes,"
"Parish,"
"Parochial,"
"Land Owner," "Tithe Owner," as used in this Act.

13 & 14 Car. 2,
c. 12.

Where Parties to be deemed joint Owner.

[The 21st section of 12 & 13 Car. 2, c. 12, after reciting that the inhabitants of several counties therein mentioned, and

12 & 13 Car. 2, c. 12.

12 & 13 Car.
2, c. 12.

many other counties in England and Wales, by reason of the largeness of the parishes within the same, could not reap the benefit of the stat. 43 Eliz. c. 2, for the relief of the poor, enacts that the poor shall be maintained in their own townships, and "that there shall be yearly chosen and appointed, according to the rules and directions in the act 43 Eliz. mentioned, two or more overseers of the poor within every of the said townships and villages," who shall execute all the powers and authorities for the necessary relief of the poor within the said township or village, and be liable to the same penalties for the non-performance thereof as mentioned in the said statute of 43 Eliz. c. 2 (2).

6 & 7 Will. 4,
c. 71, c. 12,
Construction
of Words
"liable to the
Payment of
the Rent re-
served."

[A tenant for life, a lessee for lives or for a term exceeding fourteen years, on which a rent exceeding two-thirds of the yearly value was reserved, in the actual receipt of the rents, or profits, will be owners within this act. It will be necessary to decide, in carrying this act into execution, whether persons having derivative interests of the requisite extent, will be joint owners with the original lessor or his representatives and the original lessee. Thus, suppose A., tenant in fee, to have granted a lease for twenty-one years to B., reserving a rent of less than two-thirds of the clear yearly value, and B. to have granted a lease for fifteen years to C., reserving a similar rent, the question will be, whether C. will be a joint owner, or whether A. & B. alone will answer the description of owners within this act. Supposing B. in the above case to have entered, as is usual, into a covenant to pay the rent, and instead of having granted an under-lease, to have assigned the term to C., it is not clear that B. will not be considered as a joint owner, inasmuch as it is well known, that a lessee who has entered into an express covenant to pay rent, remains liable, notwithstanding an assignment (a); for it is to be observed, the words of the act are, "liable to the payment of the rent reserved;" and although an assignee is liable to the payment of rent whilst in possession, such liability does not exonerate the original lessee. The words "liable to the payment of such rent" were substituted in the House of Lords for the words "in the actual possession or occupation (b)."

6 & 7 Will.
4, c. 71.

[The same statute provides compensation for leases which may be surrendered under the Tithe Commutation Acts, enacting by sect. 88,

Leases of
Tithes may be
surrendered.

["That it shall be lawful for the lessee being in occupation of any tithes commuted under this act, by an instrument in writing under his hand and seal, to be made in such form as the commis-

(z) [On the construction of the statute 12 & 13 Car. 2, c. 12, see 1 Nolan's P. L. p. 7—39, 4th ed.; *Bosstock v. Ridgway*, 6 B. & C. 496; 9 D. & R. 585; *Rex v. Salop*, 3 B. & Ad. 910.]

(a) [*Staines v. Morris*, 1 Ves. & B. 8.

(b) These remarks are taken from Mr. Shelford's useful work on the Tithe Commutation Acts, pp. 212, 213.—ED.]

sioners shall direct, and confirmed under their seal, to surrender and make void the lease by which the said tithes are held or enjoyed by such lessee at the time of the commutation, so far as the same may relate to the said tithes; and it shall be lawful for the commissioners, by the same instrument, to direct what compensation (if any) shall be given by the immediate lessor of any lessee at rack rent so surrendering any lease of any such tithes to such lessee, and what allowance, if any, shall be made by any lessee to his immediate lessor of any such surrendered lease, in consideration of the non-fulfilment of any conditions contained in such lease, and what deduction (if any) shall be made from the rent thenceforth payable by any lessee to his immediate lessor in respect of other hereditaments which may have been included with the said tithes in any such lease: provided always, that any intermediate lessor to whom any such lease shall have been surrendered shall, as regards his immediate lessor, be taken to be the lessee in occupation of the tithes included in the said lease."

[For leases of tithes before the Tithe Commutation Acts, see title *Leases*, vol. ii. p. 566.—ED.]

Form of a Lease of Tithes [under the Old Law.]

This indenture made the — day of — in the year —, between A. B., rector of the parish of — in the county of —, of the one part, and C. D., of —, in the parish of — and county of —, yeoman, of the other part, witnesseth, that the said A. B., for and in consideration of the rent hereinafter reserved and contained, hath demised, granted and to farm let, and by these presents doth demise, grant and to farm let, unto the said C. D., his executors, administrators and assigns, all and all manner of tithes of corn, grain, hay, and herbage, yearly growing, increasing or happening within the said parish of —, and all profits of what kind soever belonging to the parsonage or rectory there: To have, hold, receive, and take all and every the said tithes and profits unto the said C. D., his executors, administrators and assigns, from the day of the date of these presents, for and during and unto the full end and term of twenty-one years from thence next ensuing, and fully to be completed; if he the said A. B. shall so long continue rector of the said parish of —; yielding and paying therefore yearly and every year during the said term, unto the said A. B. and his assigns, the rent or sum of —, at and upon the days — by even and equal portions: Provided always, that if the said rent or any part thereof shall be behind and unpaid by the space of — days after the days and times appointed and limited for the payment thereof, then this present demise and every thing herein contained shall cease, determine and be void: And the said C. D., doth for himself, his executors, administrators and assigns, and for every of them, covenant, promise and grant, to and with the said A. B., his executors and administrators, and to and with every of them by these presents, that he the said C. D., his executors, administrators or assigns, shall and will from time to time, and at all times during the continuance of this demise, well and truly pay and satisfy the rent aforesaid, at the days and times aforesaid appointed for the payment thereof, and also shall and will pay and discharge all taxes which shall be imposed upon the said demised premises, or in respect thereof, by act of parliament or otherwise: And the

said *A. B.*, for himself, his executors and administrators, and every of them, doth covenant, promise and grant, to and with the said *C. D.*, his executors, administrators and assigns, and to and with every of them by these presents, that for and under the rents and covenants hereinbefore reserved and contained on the part of the said *C. D.*, his executors, administrators or assigns, to be paid and performed, he the said *C. D.*, his executors, administrators and assigns, shall and may have, hold and enjoy the tithes and premises aforesaid, and every part and parcel thereof, during the said term hereby granted, without any let, trouble, molestation, interruption, or denial of him the said *A. B.*, or his assigns, or any other person or persons claiming or to claim by, from or under him. In witness whereof, the parties to these presents have interchangeably set their hands and seals the day and year first above written.

A. B.

C. D.

Signed, sealed, and delivered (having been first duly stamped), in the presence of } *E. F.*
 } *G. H.*

When Tithes
must have
been leased
by Deed.

Note, it is said generally in some books that a verbal lease of tithes is not good. Others say, that tithes may be granted for one year without deed, but no longer. Others distinguish, and say, that a grant of tithes even for one year is not good by way of lease, but may be good by way of sale. Others, to the like purpose, affirm, that if the parson agrees with the parishioner that such parishioner shall keep back his own tithes for a year, this is a good bargain by way of retainer; but if he grants to him the tithes of another, though it be but for a year, it is not good unless it be by deed (*c*).

The rule, however, seems to be, that tithes may be leased, but a lease for more than one year must be by deed, as they are not capable of livery and seisin, but lie merely in grant (*d*), falling under 29 Car. 2, c. 3 (*e*), where it is added, that, to make a lease for a year good, it ought not to be entered into till after the corn is sown, for then such agreement is in the nature of a sale or chattel *in esse*, which needs no writing. A lease of tithes by deed "for all the time the lessor should continue vicar," is good, as an estate for life, determinable on the event of his ceasing to be vicar (*f*).

[It has been held, that a composition for tithes by way of retainer by parol can be good only for one year, being by way of contract, but that a parol lease of tithes even for one year would be void (*g*); and it is said, that if a lessee for years of tithes will grant it over to another at will only, it cannot be done without deed (*h*). No interest in tithes can be granted

(*c*) Cro. Jac. 613; 1 Rolle's Rep. 174; God. 354; Freem. Rep. 234; Swaddling v. Piers, 2 Brownl. 17.

(*d*) 3 Bac. Abr. 338.

(*e*) [Gardiner v. Williamson, 2 B. & Ad. 336.]

(*f*) Brewer v. Hill, 2 Anst. 413.

(*g*) [Keddington v. Keddington, Bunb. 2; Sorrell v. Grove, 1 E. & Y. 250.]

(*h*) [Shep. Touch. 230, Prest. ed.]

without deed, unless indeed where they pass as a parcel of a rectory, which, being considered a corporeal hereditament, may be demised for three years without deed (*i*). But a defective conveyance of a rectory impropriate will not pass even the tithes (*k*). An agreement not under seal cannot operate as a demise of tithes (*l*). A lease of tithes for *life* cannot be granted to commence at a future day; the rule of law with respect to freeholds applying to incorporeal hereditaments (*m*).

[XIX. Forms of Apportionment, &c. of Tithes.]

[Apportionment of the Rent-charge in lieu of Tithes in the Parish of — in the County of —.]

[Whereas an agreement for the commutation of tithes in the said — was, on the — day of — in the year —, confirmed by the tithe commissioners for England and Wales, of which agreement, with the schedules thereunto annexed, the following is a copy (*n*):—

[Now I, A. B. (*o*), of — in the county of — having been duly appointed valuer to apportion the total sum agreed to be paid by way of rent-charge (*p*) in lieu of tithes, amongst the several lands of the said —, do hereby apportion the rent-charge as follows:—
[See the Forms, post.]

(*i*) [Bellamy v. Balthorpe, 1 E. & Y. 355; Brewer v. Hill (*vide ante*), 2 Inst. 413.]

(*k*) [Robart's case, 12 Rep. 65; 1 E. & Y. 193.]

(*l*) [Gardiner v. Williamson, 2 B. & Ad. 336.]

(*m*) [Edwards v. Boothe, Yelv. 131; see title Leases, vol. ii.]

(*n*) [Here insert the agreement, with the schedule, in full. The draft of apportionment must contain a copy of the agreement. Both will be on paper, and sent to this office together with the map; the commissioners will return the draft and map to the parish, and give notice of the attendance of an assistant commissioner to hear and decide objections, or to receive notices of objections to the apportionment, after which the draft must be engrossed on parchment, and sent to the Tithe Commission Office for con-

firmation.]

(*o*) [If more than one valuer be appointed, insert here the name and description of each; and if the valuers choose an umpire, insert his name and description also.]

(*p*) [At the same time, or as soon after as the actual costs of making the apportionment can be ascertained and settled, the valuer must apportion the quota to be paid by each land-owner, according to the principle laid down in the 75th section of the act. This must be done on a separate paper. A copy of the instructions given to the valuers by the land-owners duly assembled at a parochial meeting, and the principles upon which the rent-charge has been apportioned, although not inserted in the instrument of apportionment, must be sent to the Tithe Commission Office with the apportionment.]

GROSS RENT-CHARGE payable to [the Tithe Owner or Tithe Owners, *as the*
Pounds, Shillings, and

Value in Imperial Bushels, and Decimal Parts of an Imperial Bushel

LAND OWNERS.	OCCUPIERS.	Numbers referring to the Plan.	NAMES and DESCRIPTION OF LANDS and PREMISES.	STATE* OF CULTIVATION.
Browning, Thomas	Green, James } South, John } Judd, William .. }	1	Purvis' Farm	Homestead, Yard, &c. ..
		2	Purvis' Farm Garden	Garden
		3	Orchard Close	Pasture
		4	Little Camps Herne	Arable
		5	Five Acre Wood	Wood Land ..
		6	Allotment in Herne Field	Meadow
		7	Black Croft Grove	Coppice Wood
		8	Smith's Close (ordinary charge)	Hops
		9	Allotment on the Down	Common Land
		10	Ditto in the Marsh	Water Meadow
	8	Extraordinary Charge on 5 Acres Hops,		
	Smith, Thomas .. } Williams, Richard }	11	Bull Close	Arable
		12	The Holm	Meadow
		13	Long Close	Pasture
		14	Bishop's Mead	Water Meadow
		15	King's Fallow	Arable
16		Private Road (leading to ditto.)	.....	
			TOTAL . . . . .	.....

* Where three-fourths of the Land-owners concur in a representation to the Board that the state of

FORM, No. 2,—APPORTIONMENT of

A. C. Cobham, Esq. } (Rectorial Glebe.) }	Brown, John	17	Church Field	Arable
		18	The Balk	Pasture
Rev. R. Fielde, } (Vicarial Glebe.) }	Himself	19	Rectory	House and Yard
		20	Rectory Garden	Garden
		21	Churchyard . . . . .	.....
		22	Barn Field	Arable
		23	Marsh Field	Pasture

case may be], in lieu of TITHES, for the

Pence.

of

in the County of

	Price per Bushel.	Bushels and Decimal Parts.
	£. s. d.	
of Wheat, Barley and Oats, viz.	Wheat at 0 7 0 $\frac{1}{4}$	
	Barley „ 0 3 11 $\frac{1}{2}$	
	Oats „ 0 2 9	

QUANTITIES IN STATUTE MEASURE.	Amount charged upon the several Lands and to whom payable.		NAME OF IMPROPRIATOR.	REMARKS.
	Payable to Vicar.	Payable to Rector or Impropiator.		
A. R. P.	£. s. d.	£. s. d.		
0 2 10				(q) In arriving at the gross sum to be paid by each Proprietor, the Tithe of his Arable and of his Grass land will of course be taken at different rates ; but when the whole sum has been ascertained, it may, perhaps, in the apportionment, be most conveniently spread equally over both descriptions of land, thus :—Suppose a Farm of 40 acres to contain 20 acres of Arable land at a tithe of 6s., and 20 acres of Pasture at a tithe of 2s. per acre, the whole tithe will be 8 <i>l.</i> , which, spread in the apportionment equally over the whole Farm, will be 4s. an acre.
2 0 0				
6 2 4				
4 0 5				
6 3 21				
7 3 14				
1 1 18				
5 0 0				
3 3 33				
1 3 15				
40 0 0	3 10 0	12 0 0	(q)	
at 8s. per Acre	2 0 0	—		
	5 10 0	12 0 0		Tithe formerly covered by a Modus : Tithe Free (<i>State the particular circumstances.</i>) Tithes merged (<i>State the particular circumstances.</i>) Released from rent-charge (<i>State the particular circumstances.</i>) Tithe formerly covered by Composition Real, or Prescriptive or Customary Payment (<i>State the particular circumstances.</i>)
8 0 0	—	0 2 0		
9 2 16	—	—		
5 0 0	—	—		
6 0 37	—	—		
10 1 3	—	2 0 0		
0 3 24	—	—		
80 0 0	5 10 0	14 2 0		

cultivation should not be stated in the Apportionment, the column for this purpose will be unnecessary.

RENT-CHARGES on Glebe Lands.

6 1 28	0 8 0	2 10 0		
8 2 12	0 10 6	2 0 0		
15 0 0	0 18 6	4 10 0		
0 1 11 }	—	—		
1 0 31 }	—	—		
0 2 0	—	—		
17 3 38	1 15 0	5 18 0		
9 0 0	0 13 0	2 16 0		
29 0 0	2 8 0	8 14 0		

FORM, No. 3.—SUMMARY.

LAND OWNERS.	OCCUPIERS.	QUANTITIES. A. R. P.	TOTAL PROPERTIES A. R. P.	Amount charged upon the several Lands, and to whom payable.		REMARKS.
				Payable to Vicar.	Payable to Rector or Impropriator.	
Browning, Thomas	Green, James	A. R. P. 13 0 19	80 0 0	£. s. d. 5 10 0*	£. s. d. 14 2 0	* Including the Extraor- dinary Charge on Hops, which will, of course, fluc- tuate with the changes of Cultivation.
	South, John	14 2 35				
	Judd, William	12 0 26				
	Smith, Thomas	17 2 16				
	Williams, Richard	22 1 24				
A. C. Cobham, Esq. <i>Rectorial Glebe.</i>	Brown, John	.....	15 0 0	0 18 6	4 10 0	
	Himself	.....	29 0 0	2 8 0	8 14 0	
						
Rev. R. Fielde <i>(Vicarial Glebe.)</i>	Public Roads	.....	124 0 0	8 16 6	27 6 0	
	Water	.....	2 2 20	.....	.....	
	Wastes	.....	1 0 20	.....	.....	
	TOTAL QUANTITY	.....	129 0 0	.....	.....	

Note.—The Forms (Nos. 1, 2, & 3) may together be considered as constituting a complete Schedule of Apportionment. The Forms which follow show how any individual property may be differently dealt with, according to the wishes of the Land-owner.

FORM, No. 4,—in which the RENT-CHARGES are specially apportioned on the several Fields.

[Heading the same as in Form No. 1.]

LAND OWNERS.	OCCUPIERS.	Numbers referring to the Plan.	NAME AND DESCRIPTION OF LANDS AND PREMISES.	STATE of CULTIVATION.	QUANTITIES in Statute Measure.	Amount charged upon the several Lands, and to whom payable.		NAME OF IMPROPRIATOR.	REMARKS.	
					A. R. P.	Payable to Vicar.	Payable to Rector or Impropiator.			
					A. R. P.	£. s. d.	£. s. d.			
Browning, Thomas	Green, James	1	Purvis' Farm	Homestead,	0 2 10	0 13 6	0 0 0		In no case will it be necessary to apportion the rent-charge separately on every field, but as the additional expense will be very trifling, the advantages, for the purposes of sale, exchange, or occasionally for the purpose of dividing the payments amongst tenants or occupiers, will be sufficiently obvious.	
		2	Purvis' Farm Garden ..	Yard, &c. ..	2 0 0	0 0 0	0 0 0			
		3	Orchard Close	Garden	6 2 4	0 10 6	1 19 0			
	South, John	4	Little Camps Herne ..	Pasture	4 0 5	0 5 0	1 16 0			
		5	Five Acre Wood	Arable	6 3 21	0 8 9	2 2 0			
		6	Allotment in Herne Field	Wood Land ..	7 3 14	0 12 6	2 8 0			
	Judd, William	7	Black Croft Grove	Meadow	1 1 18	0 3 6	0 8 0			
		8	Smith's Close (ordinary charge.)	Coppice Wood .	5 0 0	0 9 3	1 16 0			
		9	Allotment on the Down	Hops	3 3 33	0 5 0	1 4 0			
	10	Ditto in the Marsh	Common Land .	1 3 15	0 2 0	0 7 0				
					40 0 0	3 10 0	12 0 0			
					.....	2 0 0	0 0 0			
Extraordinary Charge on Hops ..						5 10 0	12 0 0			
8										

FORM, No. 5,—in which the RENT-CHARGES are specially apportioned, exempting certain Fields.

[Heading the same as in Form No. 1.]

LAND OWNERS.	OCCUPIERS.	Numbers referring to the Plan.	NAME AND DESCRIPTION OF LANDS AND PREMISES.	STATE of CULTIVATION.	QUANTITIES in Statute Measure.	Amount charged upon the several Lands, and to whom payable.		NAME OF IMPROPRIATOR.	REMARKS.
					A. R. P.	Payable to Vicar.	Payable to Rector or Impropiator.		
					A. R. P.	£. s. d.	£. s. d.		
Browning, Thomas	Green, James	1	Purvis' Farm	Homestead, Yard, &c. ..	0 2 10	0 0 0	0 0 0		When the same lands in a parish are subject both to rectorial and vicarial tithe, it may often be desirable to fix the rectorial tithe upon one portion of the lands, and the vicarial tithe upon another portion, so that each portion shall be subject to one payment to one tithe-owner only. The Commissioners will sanction such arrangements if made with the assent of the tithe-owner, and also made part of the instructions of the landowners to the valuers; provided always, that each portion of land so charged shall be three times the value of the whole rent-charge upon such lands.
		2	Purvis' Farm Garden ..	Garden	2 0 0	0 0 0	0 0 0		
	South, John	3	Orchard Close	Pasture	6 2 4	0 0 0	0 0 0		
		4	Little Camps Herne ..	Arable	4 0 5	0 10 0	2 3 0		
		5	Five Acre Wood	Wood Land ..	6 3 21	0 17 0	3 3 0		
	Judd, William	6	Allotment in Herne Field	Meadow	7 3 14	1 2 0	3 12 0		
		7	Black Croft Grove	Coppice Wood	1 1 18	0 5 0	0 11 0		
		8	Smith Close (ordinary charge.)	Hops	5 0 0	0 16 0	2 11 0		
		9	Allotment on the Down	Common Land	3 3 33	0 0 0	0 0 0		
		10	Ditto in the Marsh ..	Water Meadow	1 3 15	0 0 0	0 0 0		
					40 0 0	3 10 0	12 0 0		
		8	Extraordinary Charge on Hops ..			2 0 0	0 0 0		
						5 10 0	12 0 0		

[FORM, No. 6,—showing how the RENT-CHARGES may be apportioned by an equal Acreable Charge (a)
on entire Properties.]

[Heading the same as in Form No. 1.]

LAND OWNERS.	OCCUPIERS.	Numbers referring to the Plan.	NAME AND DESCRIPTION OF LANDS AND PREMISES.	STATE of CULTIVATION.	QUANTITIES in Statute Measure.	Amount charged upon the several Lands, and to whom payable.		NAME OF IMPROPRIATOR.	REMARKS.
Browning, Thomas	Green, James	1	Purvis' Farm	Homestead, Yard, &c. ..	A. R. P.	£. s. d.	£. s. d.		Being an equal Acreable Charge of 1s. 9d. per Acre for the Vicarial Tithe; and an equal Acreable Charge of 6s. per Acre for the Rectorial Tithe.
		2	Purvis' Farm Garden ..	Garden					
	South, John	3	Orchard Close	Pasture					
		4	Little Camps Herne ..	Arable					
		5	Five Acre Wood	Wood Land					
	Judd, William	6	Allotment in Herne Field	Meadow					
		7	Black Croft Grove	Coppice Wood					
		8	Smith's Close (ordinary charge.)	Hops					
		9	Allotment on the Down	Common Land					
		10	Ditto in the Marsh ..	Water Meadow					
		8	Extraord. Charge on 5 Acres Hops, at 8s.	per Acre		40 0 0	3 10 0	12 0 0	
							2 0 0		
							5 10 0		

(a) The Forms of Apportionment (Nos. 6 and 7) can only be adopted where the Maps accompanying the Instrument of Apportionment obtain the Seal of the Commission.—In cases where the Map is of a different character, and where Land-owners wish to apportion their Rent-charges acreably, the Commissioners will, in addition to the General Map, receive Maps of individual Properties on a scale of not less than four Chains to an Inch; and, on their passing the requisite tests, will permit the parties, with the consent of the Tithe-owner, to fix an acreable Rent-charge. An acreable Rent-charge, without such accurate Maps, might involve the Tithe-owners hereafter in disputes as to the gross amount due to them from particular properties.

FORM, No. 7,—showing how the RENT-CHARGES may be apportioned by equal Acreable Charges (a) on contiguous Portions of an Estate; the Charges varying in Amount according to the different Qualities and Value of the Lands.

[Heading the same as in Form No. 1.]

LAND OWNERS.	OCCUPIERS.	Numbers referring to the plan.	NAME AND DESCRIPTION OF LANDS AND PREMISES.	STATE of CULTIVATION.	QUANTITIES in Statute Measure.	Amount charged upon the several Lands, and to whom payable.		NAME OF IMPROPRIATOR.	REMARKS.
						Payable to Vicar.	Payable to Rector or Improprator.		
Browning, Thomas	Green, James	1	Purvis' Farm	Homestead, Yard, &c. . .	20 0 0	£. s. d.	£. s. d.		Being equal Acreable Charges of 1s. 6d. per Acre for Vicarial, and 4s. per Acre for Rectorial Tithe.
		2	Purvis' Farm Garden	Garden		1 10 0	4 0 0		
		3	Orchard Close	Pasture					
		4	Little Camps Herne ..	Arable					
		5	Five Acre Wood	Wood Land ..					
	South, John	6	Allotment in Herne Field	Meadow	20 0 0				Being equal Acreable Charges of 2s. per Acre for Vicarial, and 8s. per Acre for Rectorial Tithe.
		7	Black Croft Grove....	Coppice Wood					
		8	Smith's Close (ordinary charge)	Hops		2 0 0	8 0 0		
	Judd, William	9	Allotment on the Down	Common Land	40 0 0				
		10	Ditto in the Marsh ..	Water Meadow		3 10 0	12 0 0		
		8	Extraord. Charge on 5 Acres Hops, at 8s. per Acre.			2 0 0			
						5 10 0			

(a) See Note, preceding page.

Table of Small and Vicarial Tithes.

		A.	R.	P.	
		....	:	:	Arable.
		....	:	:	Meadow.
		....	:	:	Pasture.
		....	:	:	Hop-Land.
			:	:	
			:	:	thereof Orcharding.
					Real worth.
					Reduced Scale.
					Amount.
					£. s. d.
AGISTMENT of	Horses, above 2-yrs old, from Lady-day to Michaelmas, at per week each				
	Ditto from Mich. to Lady-day, at per week each				
	Ditto Two-years old, from Lady-day to Mich. at per week each				
	Ditto from Mich. to Lady-day, at per week each				
	Ditto Yearlings, from Lady-day to Michaelmas, at per week each				
	Ditto from Mich. to Lady-day, at per week each				
Agistment of	Beasts, above two-years old, from Lady-day to Mich. at per week each				
	Ditto from Mich. to Lady-day, at per week each				
	Ditto Two-years old, from Lady-day to Mich. at per week each				
	Ditto from Mich. to Lady-day, at per week each				
	Ditto Yearlings, from Lady-day to Michaelmas, at per week each				
	Ditto from Mich. to Lady-day, at per week each				
Agistment of	Sheep, large, from Lady-day to Michaelmas, at per week each				
	Ditto from Mich. to Lady-day, at per week each				
	Ditto Smaller Sheep, or Weaned Lambs, from Lady-day to Mich. at per week each ..				
	Ditto from Mich. to Lady-day, at per week each				
Calves,—when fit to tithe, (viz.) when taken from the Cow to be sold, kept, or killed, worth each on an average—	Tithe				
Lambs,—when fit to tithe, (viz.) when weaned, which is generally at Lammas, or in July, average worth					
Wool from Sheep, each producing lbs.	Tithe, tenth part, and worth per lb.				
Wool from Lambs, Tithe, tenth part					
Foals,—when fit to value for Tithing, average worth £	Tithe thereon				
Pigs,—a sow producing on an average pigs in a year, and when fit to Tithe at 4 or 5 weeks old, worth each, on an average					
Hens, Eggs and Chickens,—Tithe on the produce of each Hen in a year					
Geese,—each rearing in a year, and when fit to Tithe worth each					
Ducks,—each rearing in a year, and when fit to Tithe worth each					
Turkies, each rearing in a year, and when fit to Tithe worth each					
Hops,— : : at Cwts. on an Acre, on an average, at £ : : a Cwt.					

(Continued.)

	Real worth.	Reduced Scale.	Amount. £. s. d.
Potatoes,—worth £ : : an Acre, Tithe thereon :			
Turnips,—worth £ : : an Acre, Tithe thereon :			
or per bushel.....			
Grass Seeds, Clover, £ : : per Cwt.			
Vetches,—£ : :			
Hemp and Flax, 5s. an Acre.....			
Apples and Pears,— Bags of 10 Pecks each, at per bag			
Garden Stuff, Plums, Cherries, Wall Fruit			
Honey and Wax.....			
Milk from Cows, each producing—			
Qts. a Day, for 90 Days, is	Qts. at		
Qts. a Day, for 90 Days, is	Qts. at		
Qts. a Day, for 60 Days, is	Qts. at		
	10)		
Tithe on one Cow.....			
Number of Milking Cows			

RETURN to an Order of the Honourable the House of Commons, dated 19th February, 1836 ;—for

AN ACCOUNT of the Average Prices of British Wheat, Barley and Oats, in England and Wales, for the Seven Years preceding 31st December, 1835, computed from the Weekly Averages of the Corn Returns.

	Wheat.	Barley.	Oats.
Years Ended	Per Quarter.	Per Quarter.	Per Quarter.
	s. d.	s. d.	s. d.
1829.....	66 3	32 6	22 9
1830.....	64 3	32 7	24 5
1831.....	66 4	38 0	25 4
1832.....	58 8	33 1	20 5
1833.....	52 11	27 6	18 5
1834.....	46 2	29 0	20 11
1835.....	39 4	29 11	22 0
Average of the Seven Years	56 3	31 9	22 0

WILLIAM JACOB,
Comptroller of Corn Returns.

Corn Department, }
Board of Trade. }

Title for Orders—See **Ordination**.

Toleration—See **Dissenters**.

Tomb-Stones—See **Burial**.

Translation—See **Bishops**.

Transubstantiation—See **Lord's Supper**.

Trees in the Churchyard—See **Church**.

Trentals.

TRENTALS, *trigintalia*, were masses for souls departed, to be said thirty times in such order as should be appointed; or for thirty days together; or otherwise every thirtieth day; according to the direction of the donor or founder, who instituted a stipend for that purpose.

Troper.

TROPER, *troperium*, is the book which containeth the sequences, which were devotions used in the church, after reading of the epistle (*s*).

Tunic.

TUNIC, *tunica*, was the subdeacon's garment, which he wore in serving the priest at the celebration of the mass (*t*).

(*s*) Lindw. 251.

(*t*) Lindw. 252.

END OF THE THIRD VOLUME.

Emile for Obituary—See Obituary.

Emulation—See Emulation.

Emulation—See Emulation.

Emulation—See Emulation.

Emulation—See Emulation.

Emulation—See Emulation.

Emulation.

THESE, being the names of those who were appointed to be and thirty times in such order as should be appointed; or for thirty days together; or otherwise every thirty days; according to the direction of the donor or founder, who shall send a response for that purpose.

Emulation.

THESE, being the names of those who were appointed to be and thirty times in such order as should be appointed; or for thirty days together; or otherwise every thirty days; according to the direction of the donor or founder, who shall send a response for that purpose.

Emulation.

THESE, being the names of those who were appointed to be and thirty times in such order as should be appointed; or for thirty days together; or otherwise every thirty days; according to the direction of the donor or founder, who shall send a response for that purpose.

(c) 1111. 111.

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